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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 23, 2019

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OF
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FILED 20 SEPTEMBER 2016

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SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

THOMAS BENTLEY, EMPLOYEE, PLAINTIFF
v.
JONATHAN PINER CONSTRUCTION, ALLEGED EMPLOYER, AND STONEWOOD INSURANCE COMPANY, ALLEGED CARRIER, DEFENDANTS

No. COA16-62

Filed 20 September 2016

Workers' Compensation—opinion and award—deputy commissioner not present for hearing

The Industrial Commission erred by basing its opinion and award in plaintiff's workers' compensation claim on an opinion and award by a deputy commissioner who was not present at the hearing and did not hear evidence.

Appeal by Plaintiff from opinion and award of the North Carolina Industrial Commission entered 9 October 2015. Heard in the Court of Appeals 8 August 2016.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, and Robert C. Dodge, P.A., by Robert C. Dodge, for Plaintiff-Appellant.

Dickie, McCamey & Chilcote, P.C., by Martin R. Jernigan and Michael W. Ballance, for Defendants-Appellees.

McGEE, Chief Judge.

Thomas Bentley ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") determining he was not an "employee" of Jonathan Piner Construction ("Piner Construction"), as that term is used in the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1 *et seq.* On appeal, Plaintiff contends, *inter alia*, that the Commission erred by basing its opinion and award on an opinion and order by a deputy commissioner who was not present at the hearing and did not hear the evidence. We agree, vacate the Commission's opinion and award, and remand for a new hearing.

I. Background

Piner Construction, a residential and commercial contractor, hired Plaintiff to work as a framer at one of its construction sites. While working at the construction site on 3 March 2014, Plaintiff was injured when

a nail he was prying from a board broke loose and struck him in the right eye. Following the injury, Plaintiff filed a workers' compensation claim with the Commission on 25 March 2014. Piner Construction, along with its insurance carrier, Stonewood Insurance Company (collectively, "Defendants") denied the claim for compensation, contending the injury was non-compensable under the Workers' Compensation Act because Plaintiff was not an employee of Piner Construction on the date of the accident. The claim was assigned for a hearing before Deputy Commissioner Mary C. Vilas ("Deputy Vilas").

A hearing before Deputy Vilas occurred on 5 December 2014. Near the end of the hearing, Deputy Vilas suggested that the jurisdictional question of whether Plaintiff was an employee of Piner Construction be bifurcated from the merits of Plaintiff's claim, because she would no longer be at the Commission after 1 February 2015. Deputy Vilas noted that she had many cases to write, but she would "try" to decide the jurisdictional question in the present case before she left the Commission. An order bifurcating the jurisdictional and merits issues was filed 9 December 2014 by Deputy Vilas, and stated that bifurcation "was appropriate given the issues for hearing and that medical testimony by deposition is not scheduled until 26 January 2015 and [Deputy Vilas] will not be at the Commission after 1 February 2015." Deputy Vilas filed an order closing the record and declaring that the jurisdictional issue was "ready for a decision" on 12 January 2015.

An opinion and order was entered 16 February 2015 by Deputy Commissioner William H. Shipley ("Deputy Shipley"). Deputy Shipley concluded as a matter of law that the Commission lacked jurisdiction over Plaintiff's claim because he was not an employee of Piner Construction at the time his injury was sustained. Plaintiff appealed to the full Commission, which came to the same conclusion in an opinion and award entered 9 October 2015. Plaintiff appeals.

II. Analysis

Plaintiff argues the Commission erred in basing its decision on an opinion and award of a deputy commissioner who did not hear the evidence.[1] Whether N.C. Gen. Stat. § 97-84 permits one deputy commissioner to consider the evidence and another to render an opinion and

1. Plaintiff raises two other arguments in his brief regarding the merits of the Commission's decision. Because we agree that a plain reading of N.C. Gen. Stat. § 97-84 requires a single deputy commissioner to both hear the evidence and render an opinion and award, we do not reach the remaining issues presented for adjudication.

award is a question of statutory interpretation, which we review *de novo*. *See In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (stating that "[q]uestions of statutory interpretation are questions of law and are reviewed de novo" (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998))).

Statutory interpretation "properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." (citation omitted)).

The statute at issue in this case, N.C.G.S. § 97-84, provides:

> The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The Commission shall decide the case and issue findings of fact based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by *a deputy*, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, *and said deputy* shall proceed to a *complete determination of the matters in dispute*, *file his written opinion within 180 days of the close of the hearing record* unless time is extended for good cause by the Commission, and *the deputy* shall cause to be issued an award pursuant to such determination.

N.C. Gen. Stat. § 97-84 (2015) (emphasis added). Considering the words in the statute as they appear, and giving those words their plain and

ordinary meaning, we find that if a dispute in the Industrial Commission is heard by a deputy, N.C.G.S. § 97-84 requires "said deputy" to both arrive at a "complete determination of the matters in dispute," and "file his [or her] written opinion[.]"[2] The statute refers to a deputy commissioner in the singular form throughout the statute, stating that "a deputy" may hear the dispute in the same manner as "a member" of the Commission, and that "said deputy" shall proceed to a complete determination of the case, file an opinion, and "the deputy" shall cause an award to be issued.

We believe the context in which "a deputy," "said deputy," and "the deputy" are used in N.C.G.S. § 97-84 evidences the General Assembly's intent that a single deputy handle a case from its outset to its completion. We recognize that, under the Workers' Compensation Act, we are to read the singular to include the plural unless the context requires otherwise. *See* N.C. Gen. Stat. § 97-2(17) (2015) (providing that "the singular includes the plural" unless "the context otherwise requires"). However, reading the singular to include the plural in this instance – reading "a deputy" as "deputies," "said deputy" as "said deputies," and "the deputy" as "the deputies" – would permit a panel of deputies to hear the dispute and, taken to its logical conclusion, would also permit one deputy to issue preliminary orders, another deputy to hear the testimony, another to close the record, and yet another to render a decision. In the latter circumstance, no one deputy would have come to a "complete determination of the matters in dispute," rendering that portion of the statute superfluous. *See Estate of Jacobs v. State*, ___ N.C. App. ___, ___, 775 S.E.2d 873, 877, *disc. review denied*, ___ N.C. ___, 778 S.E.2d 93 (2015) (declining to adopt an interpretation that would have rendered portions of a statute "superfluous or nonsensical").

We believe the context in which "a deputy," "said deputy," and "the deputy" are used requires that the entire process be handled by a single deputy commissioner, and that a contrary interpretation would contravene the manifest intent of the General Assembly. N.C.G.S. § 97-2(17); *see also* N.C. Gen. Stat. § 12-3(1) (2015) (providing that in the interpretation of statutes, "[e]very word importing the singular number only shall extend and be applied to several persons or things," unless

2. This question is one of first impression. In *Crawford v. Board of Education*, 3 N.C. App. 343, 164 S.E.2d 748 (1968), the defendant argued the Commission erred in allowing a hearing officer to preside at the hearing in which the majority of the evidence was presented, when another hearing officer presided over the first day of the hearing and ultimately issued the opinion and award. 3 N.C. App at 347-48, 164 S.E.2d at 751. However, this Court found the defendant's argument on the issue to be waived, and did not reach the merits. *Id.*

"such construction would be inconsistent with the manifest intent of the General Assembly.").

In so finding, we rely only on the plain language of the statute, and reject Plaintiff's argument that *State v. Bartlett*, 368 N.C. 309, 776 S.E.2d 672 (2015) controls this case. In *Bartlett*, our Supreme Court interpreted a provision of the North Carolina Criminal Procedure Act, N.C. Gen. Stat. § 15A-977, as requiring a trial judge who presides at a suppression hearing to also issue the findings of fact. 368 N.C. at 313, 776 S.E.2d at 647. This is so, the Court reasoned, because "[t]he trial judge who presides at a suppression hearing 'sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth.' " *Id.* (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971)). Plaintiff reasons that, because a deputy commissioner hearing evidence in the Industrial Commission functions like a trial judge at a suppression hearing, *Bartlett*'s holding should be read to mandate that a single deputy commissioner both hear the evidence and render a decision.

Clear precedent from our Supreme Court allows us to reject this reasoning. As Defendants point out, in *Adams v. AVX Corp*, 349 N.C. 676, 509 S.E.2d 411 (1998), our Supreme Court stated that under the Workers' Compensation Act, "the Commission is the fact finding body" and is the "sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* at 680, 509 S.E.2d at 413 (citation omitted). Defendants correctly note that under *Adams*, the full Commission reviewing the opinion and award of the hearing officer may either conduct a new hearing or proceed on the cold record, and unlike N.C.G.S. § 15A-977, which entrusts the trial court to be the fact finder, N.C. Gen. Stat. § 97-85 "places the ultimate fact-finding function with the Commission – not the hearing officer." *Id.* at 681, 509 S.E.2d at 413.

We are cognizant of *Adams* and its instruction that the full Commission is the sole judge of the credibility of witnesses. *Id.* Defendants argue that, because the Commission may proceed on a cold record in reviewing the hearing officer's decision, whether the deputy commissioner issuing the original opinion and order heard live testimony or proceeded on a cold record is of no moment. However, we cannot ignore the plain language of a statute. Our decision does not question the Commission's ability to review the hearing officer's decision on a cold record – under our precedents it unquestionably can. In the present case, we simply examine whether the plain language of N.C.G.S. § 97-84 permits a deputy commissioner to issue an opinion and order in a case over which he or

she did not personally preside. As noted, we find said language to unambiguously dictate that when "a deputy" commissioner presides over a dispute, "*said deputy* shall proceed to a *complete determination of the matters in dispute*, file his written opinion within 180 days of the close of the hearing record," and "cause to be issued an award pursuant to such determination." N.C.G.S. § 97-84 (emphasis added).

In the present case, Deputy Vilas presided over the hearing, issued a preliminary order bifurcating the jurisdictional and merits issues, and closed the record on the issue of the employment relationship, while Deputy Shipley issued the opinion and order finding that the Commission had no jurisdiction because Plaintiff was not an employee of Piner Construction. Neither Deputy Vilas nor Deputy Shipley "proceed[ed] to a complete determination of the matters in dispute," "file[d] [a] written opinion," *and* "cause[d] to be issued an award pursuant to such determination." N.C.G.S. § 97-84. We therefore conclude that the proceedings before Deputy Vilas resulting in an opinion and order by Deputy Shipley violated N.C.G.S. § 97-84.

III. Conclusion

For the reasons stated, the Commission's opinion and award is vacated, and this case is remanded for a new hearing.

VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

GILBERT BREEDLOVE AND THOMAS HOLLAND, PLAINTIFFS
v.
MARION R. WARREN, IN HIS OFFICIAL CAPACITY AS INTERIM DIRECTOR OF THE N.C. ADMINISTRATIVE OFFICE OF THE COURTS, AND THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, DEFENDANTS

No. COA15-1381

Filed 20 September 2016

1. Courts—Administrative Office of Courts—no power over magistrates—standing

The trial court did not err by granting defendants' motion to dismiss based on lack of standing. Defendant Administrative Office of the Courts (AOC) does not have power to nominate, appoint, remove, or otherwise control magistrates, nor does AOC have the power to institute criminal prosecutions against magistrates for failure to perform their duties.

2. Appeal and Error—motion to dismiss—failure to state a claim—argument not addressed

Although plaintiffs contended the trial court erred by granting defendants' motion to dismiss based on failure to state a claim, this argument was not addressed because the Court of Appeals already held that the trial court did not err in dismissing plaintiffs' complaint for lack of standing.

Appeal by plaintiffs from order entered 19 September 2015 by Judge George B. Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 May 2016.

Center for Law and Freedom, by Elliot Engstrom, and Ellis Boyle Law, PLLC, by W. Ellis Boyle, for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for defendant-appellees.

CALABRIA, Judge.

Gilbert Breedlove ("Breedlove") and Thomas Holland ("Holland") (collectively, "plaintiffs") brought this action against the North Carolina Administrative Office of the Courts ("AOC") and its Interim Director, Marion R. Warren ("Warren") (collectively, "defendants"). Plaintiffs appeal the trial court's grant of defendants' motion to dismiss. We affirm.

I. Factual and Procedural Background

Plaintiffs served as magistrates, Breedlove from Swain County and Holland from Graham County. Both identify as devout Christians.

In the autumn of 2014, the Supreme Court of the United States, and the Court of Appeals for the Fourth Circuit, established that states within the Fourth Circuit, including North Carolina, cannot decline to marry a same-sex couple, nor can they decline to recognize an otherwise lawful marriage of a same-sex couple from a different state. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S.Ct. 308, 190 L. Ed. 2d 140 (2014). This holding was subsequently and explicitly affirmed under North Carolina law. *See Gen. Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014) (holding that "any . . . source of state law that operates to deny same-sex couples the right to marry in the State of North Carolina . . . [is,] in accordance with *Bostic*, *supra*, unconstitutional").

On 13 October 2014, the Director of AOC, at the time John Smith ("Smith"), issued a guidance memorandum (the "Interim Guidance Memo") to various North Carolina judicial employees, including, *inter alia*, plaintiffs. This document stated that the AOC had "received a sufficient number of requests for guidance given the recent federal ruling on same-sex marriages to justify this interim memorandum of guidance to magistrates." This document stated that magistrates should immediately begin conducting marriage ceremonies for same-sex couples, and that such marriages "should not be delayed or postponed while awaiting further clarification of other questions or issues." The document further advised recipients that a more detailed memorandum was forthcoming.

On 14 October 2014, AOC issued a second memorandum (the "Same-Sex Marriages Memo") to various North Carolina judicial employees, including, *inter alia*, plaintiffs. In this document, AOC presented various questions, and answers thereto, on the issue of magistrates performing same-sex marriages. In response to the question as to whether a magistrate who performs other marriages may refuse to marry a same-sex couple for whom a marriage license had been issued, the document stated that a magistrate's refusal to lawfully marry a same-sex couple would "[violate] the equal protection clause of the U.S. Constitution" and further "would constitute a violation of the oath and a failure to perform a duty of the office." In response to the question as to the consequences of refusal of a magistrate to marry a same-sex couple, the document stated that "refusal is grounds for suspension or removal from office,

as well as potential criminal charges[,]" and that North Carolina law "makes clear that this criminal provision remains enforceable in addition to the procedures for suspension and removal under G.S. 7A-173." In response to the question of whether a magistrate's reason for refusal made a difference to the outcome, the document stated that it did not.

On 5 November 2014, AOC composed a letter to Senator Phil Berger ("Berger"), President *Pro Tempore* of the North Carolina Senate. Berger had requested that AOC revise the Same-Sex Marriages Memo, and suggested that the document violated the religious workplace protections of federal Title VII. In its letter in response to Berger, AOC stated that "our magistrates are affirmatively bound by [federal] rulings in exercising their official powers," and that the document was issued to judicial employees in order to ensure that they are "aware of the potential consequences for failure to comply with the injunction and follow the law."

Plaintiffs sought accommodations so that they would not be forced to violate their religious beliefs by performing same-sex marriages. Plaintiffs' requests for accommodation were denied, and plaintiffs ultimately resigned.

On 6 April 2015, plaintiffs brought the underlying action against AOC and Smith. Plaintiffs' complaint alleged violations of plaintiffs' rights under the North Carolina Constitution, and sought a declaratory judgment that AOC's policy of forcing plaintiffs to perform same-sex marriages was unconstitutional, and a preliminary and permanent injunction against being forced to perform same-sex marriages. Plaintiffs also sought to be reappointed as magistrates, and to receive back pay and benefits for the time spent resigned from their posts.

On 11 May 2015, Smith and AOC filed a motion to dismiss plaintiffs' complaint, pursuant to, *inter alia*, Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Specifically, the motion alleged that plaintiffs "have failed to allege an actual case or controversy, in that neither the AOC Director nor AOC has any authority over magistrates, and Plaintiffs, therefore, lack standing;" and that plaintiffs failed to state a claim upon which relief can be granted, in that the memoranda at issue "did not constitute a mandate to magistrates" and "[did] not violate either plaintiff's rights[,]" and that Smith was "entitled to qualified immunity."

Between the filing of this motion and the filing of the trial court's order, Smith stepped down from his role, and Warren was appointed Interim Director of AOC. Warren replaced Smith, in his official capacity, as a defendant in this case.

On 19 September 2015, the trial court entered an order on defendants' motion to dismiss. In its order, the trial court found and held that it "lacks subject matter jurisdiction in that there is no actual case or controversy, because the defendants have no power to nominate, appoint, remove, or otherwise control magistrates, nor do the defendants have the power to institute criminal prosecutions against magistrates for failure to perform their duties." The trial court granted defendants' motion to dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

Plaintiffs appeal.

II. Motion to Dismiss for Lack of Standing

[1] In their first argument, plaintiffs contend that the trial court erred in granting defendants' motion to dismiss for lack of standing. We disagree.

A. Standard of Review

"In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

B. Analysis

"As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted). In order for a plaintiff to demonstrate standing, he must show three things:

> (1) injury in fact-an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 460, 646 S.E.2d 418, 423 (2007) (citations and quotations omitted).

Plaintiffs contend that they had standing to bring their claims against defendants because (1) defendants were in a position of practical and actual authority over plaintiffs, (2) defendants exerted authority over North Carolina magistrates, including plaintiffs, and (3) plaintiffs resigned from their positions as magistrates due to defendants' exertions

of authority. For the purpose of defendants' motion to dismiss, these allegations are taken as true.

The North Carolina Constitution provides for the appointment of magistrates as follows:

> For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court.

N.C. Const., art. IV, § 10. This provision is further codified in the North Carolina General Statutes. *See* N.C. Gen. Stat. § 7A-171 (2015).

The General Statutes also provide procedures for the removal of magistrates:

> A magistrate may be suspended from performing the duties of his office by the chief district judge of the district court district in which his county is located, or removed from office by the senior regular resident superior court judge of, or any regular superior court judge holding court in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located. Grounds for suspension or removal are the same as for a judge of the General Court of Justice.

N.C. Gen. Stat. § 7A-173(a) (2015).

Lastly, the General Statutes provide for the administrative and supervisory authority over magistrates:

> The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:
>
> . . .
>
> (4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a

> particular county shall be available for the performance of their duties to another district court judge or the clerk of the superior court, or the judge may appoint a chief magistrate to fulfill some or all of the duties under subdivision (12) of this section, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate.

N.C. Gen. Stat. § 7A-146(4) (2015).

These statutes, taken together, make it explicit that the appointment of magistrates is within the authority of the Senior Resident Superior Court Judge; that the suspension of magistrates is within the authority of the Chief District Court Judge; that the removal of magistrates is within the authority the Senior Resident Superior Court Judge, or any superior court judge holding court in the relevant county; and that administrative and supervisory authority over magistrates is vested in the Chief District Court Judge, pursuant to the general supervision of the Chief Justice of the Supreme Court. Nowhere in any of these statutes is AOC listed as a party with any authority to appoint, sanction, suspend, remove, or generally supervise magistrates.

Plaintiffs contend that defendants nonetheless possess this authority, due to various statutory provisions that grant AOC various ministerial powers with respect to judicial employees and officials, including magistrates. However, plaintiffs' complaint was not premised upon defendants setting their salary, or evaluating their work experience; it was premised upon the concern that their adherence to their religious beliefs would result in their removal as magistrates. Although AOC is entrusted with statutory authority to establish and evaluate judicial compliance with regulations, rules, and procedures,[1] the statutes cited above clearly show that AOC lacked the power, its memoranda notwithstanding, to sanction, suspend, or remove plaintiffs. As such, we hold that defendants lacked any authority to sanction, suspend, or remove plaintiffs.

Because defendants lacked the actual authority to sanction, suspend, or remove plaintiffs, the allegations in plaintiffs' complaint, when viewed as true and considered in the light most favorable to plaintiffs, fail to demonstrate an injury that defendants were capable of inflicting

1. *See, e.g.*, N.C. Gen. Stat. §§ 7A-171.1, 7A-171.2, 7A-174, 7A-177, 7A-343.

upon plaintiffs, and by extension fails to show that such an injury could be redressed. If defendants could not remove plaintiffs, then defendants could not have harmed plaintiffs by such a removal, and therefore plaintiffs lacked standing to bring an action for this purported harm. We therefore hold that the trial court did not err in granting defendants' motion to dismiss for lack of standing.

This argument is without merit.

III. Motion to Dismiss for Failure to State a Claim

[2] In their second argument, plaintiffs contend that the trial court erred in granting defendants' motion to dismiss for failure to state a claim. Because we have already held that the trial court did not err in dismissing plaintiffs' complaint for lack of standing, we need not address this issue.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

EVERETT E. HENKEL, JR., PLAINTIFF
v.
TRIANGLE HOMES, INC., DEFENDANT

No. COA15-1123

Filed 20 September 2016

Deeds—foreclosure sale—pre-existing federal tax lien

The trial court did not err in a quiet title action by granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment and judgment as a matter of law. A deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a pre-existing federal tax lien on the property.

Appeal by Defendant from final order and judgment entered 25 May 2016 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 31 March 2016.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Anthony S. di Santi, for Plaintiff-Appellee.

Asheville Law Group, by Michael G. Wimer and Jake A. Snider, for Defendant-Appellant.

INMAN, Judge.

A deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a pre-existing federal tax lien on the property.

Triangle Homes, Inc. ("Defendant") appeals from the trial court's 29 May 2015 judgment in favor of Everett Henkel ("Plaintiff") in a quiet title action. Defendant contends that (1) the trial court erred because North Carolina is a "pure race" jurisdiction and Defendant recorded its deed prior to Plaintiff recording his deed; (2) the local tax lien was superior to the federal tax lien and therefore extinguished the federal tax lien upon foreclosure; and (3) the federal tax lien was discharged when the Internal Revenue Service issued its Deed of Real Estate to Plaintiff.

After careful review, we affirm the trial court's order.

I. Factual and Procedural History

On 31 January 2007 Zodie and Sage Johnson conveyed to Garry and Amanda Lynch ("the Lynches") a warranty deed for Lot 87 of Mushroom Park Subdivision ("the Parcel") in Avery County, North Carolina. The Lynches recorded the deed with the Avery County Register of Deeds Office on 2 February 2008. Following the conveyance, a series of federal and municipal property tax liens were levied against the Parcel. The first of these was a federal tax lien for the amount of $888,765.42 issued on 7 December 2011 and recorded by the United States with the Avery County Register of Deeds Office on 29 December 2011. The second was a federal tax lien for the amount of $877,490.42 issued on 27 August 2012 and recorded by the United States with the Avery County Register of Deeds Office on 4 September 2012. The third lien was for a tax liability to the Village of Sugar Mountain ("the Village"), an incorporated municipality.

On 12 February 2013, the Village filed a complaint in Avery County District Court alleging the Lynches had failed to pay local property taxes for the Parcel in the amount of $2,575.16. On 23 September 2013 the district court entered a Default Judgment against the Lynches and issued a notice of foreclosure sale scheduled for 13 November 2013. Although federal statute 26 U.S.C. § 7425(a) required notice to be given to the United States, at no point before or during the district court action or the foreclosure sale following that action was the United States joined as a party or provided notice.

The Village's judicial tax foreclosure sale took place on 13 November 2013 at 10:00 a.m. No one attended the sale except for a representative of the Village, which was the highest bidder with a purchase price of $6,673.73.

The following day, 14 November 2013, the federal tax lien foreclosure sale was held and the Parcel was sold to Plaintiff for a total purchase price of $172,000 with a deposit of $20,000 paid at the foreclosure sale. It was made known to the attendants at the second foreclosure sale that there had been a prior foreclosure sale the day before on a municipal tax lien. After several conversations, a representative for the Village, the highest bidder at the municipal tax foreclosure sale, agreed to assign any interest it had in the Parcel to the highest bidder at the federal tax foreclosure sale. Plaintiff received a "Receipt for Deposit" and "Notice to Purchaser or Purchaser's Assignee" for this sale on 14 November 2013.

On this same day, approximately four hours after the federal tax lien foreclosure sale, and with proper notice of the federal tax lien foreclosure sale and the events occurring therein, Defendant filed an upset bid on the Village's judicial foreclosure sale in the amount of $7,423.73. Following the filing of this upset bid, an attorney for the Village warned Defendant's principal about the federal tax lien and foreclosure sale, explained that the deed Defendant was purchasing was a quitclaim deed with no warranties so that Defendant was unlikely to be able to obtain a clean title, and offered to refund Defendant's deposit. Defendant's principal acknowledged his understanding and proceeded to affirm his upset bid.[1]

On or before 14 December 2013, Plaintiff tendered the remaining balance for the purchase price to the Internal Revenue Service. On 16 December 2013, Plaintiff received a Form 2435 Certificate of Sale of Seized Property.

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1. After obtaining the quitclaim deed for $7,423.73 in November 2013, Defendant's principal, on behalf of Defendant, entered into a contract to sell the Parcel to third parties for $144,000.00 and promised to convey fee simple marketable title, free of all liens. Defendant's principal did not disclose to the third parties the federal tax lien or the fact that Plaintiff had purchased the Parcel in the federal tax foreclosure sale. After the North Carolina Real Estate Commission accused Defendant's principal, James McClure, of improper, fraudulent and/or dishonest dealing in violation of N.C. Gen. Stat. § 93A-6(a)(10) as the result of his conduct with regard to the Parcel, Mr. McClure voluntarily surrendered his North Carolina real estate broker's license.

On 3 January 2014, Defendant filed a Motion Confirming Foreclosure Sale with the Avery County District Court, seeking to confirm its upset bid. The district court entered a Final Report and Accounting of Foreclosure Sale for the Village's judicial foreclosure, awarding the Parcel to Defendant for the amount of $7,423.73 on 21 January 2014. On or about this date, Defendant paid the final purchase price and an attorney for the Village drafted and executed a Commissioner's Deed, which Defendant recorded on 7 April 2014.

On 20 May 2014, following a statutory 180-day waiting period in which no one redeemed the property following the federal tax foreclosure sale, Plaintiff mailed the Certificate of Sale of Seized Property to the Internal Revenue Service. On 28 May 2014, Plaintiff received a Deed of Real Estate from the Internal Revenue Service. Plaintiff recorded the deed on 6 June 2014 with the Avery County Register of Deeds Office.

Plaintiff filed a complaint against Defendant on 15 October 2014 in Avery County Superior Court seeking quiet title in the Parcel. Following Defendant's Answer, both parties filed Motions for Summary Judgment. The cross-motions were heard on 11 May 2015. On 25 May 2015, the trial court entered summary judgment in favor of Plaintiff, declaring Plaintiff "the owner in fee simple" of the Parcel and awarding Plaintiff his costs incurred in the action.

Defendant timely filed a Notice of Appeal.

II. Analysis

A. Standard of Review

"An award of summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law.' " *Austin Maintenance & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 407, 742 S.E.2d 535, 540 (2012) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). On appeal, the standard of review from summary judgment "is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Id.* at 408, 742 S.E.2d at 541 (internal citations omitted). A trial court's decision granting summary judgment is reviewed *de novo*. *Id.* (citing *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986)).

B. North Carolina as a "pure race" jurisdiction

Defendant first contends that its deed should prevail because it was the first to record a deed with the Avery County Register of Deeds Office. We disagree.

Defendant's argument relies on N.C. Gen. Stat. § 47-18(a), North Carolina's recordation statute, which provides:

> No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies . . . .

N.C. Gen. Stat. § 47-18(a) (2015). This statute makes North Carolina a "pure race" jurisdiction, "in which the first to record an interest in land holds an interest superior to all other purchases for value, regardless of actual or constructive notice as to other, unrecorded conveyances." *Rowe v. Walker* 114 N.C. App. 36, 39, 441 S.E.2d 156, 158 (1994). N.C. Gen. Stat. § 47-18(a) applies "[w]here a grantor conveys the same property to two different purchasers," and results in "the first purchaser to record his deed win[ning] the 'race to the Register of Deeds' Office' and thereby defeat[ing] the other's claim to the property, even if he has actual notice of the conveyance to the other purchaser." *Id.* (internal citations omitted). This statute, however, is inapplicable to the case at hand.

At the time of the Village's judicial foreclosure sale, there were three prior recorded tax liens on the Parcel: the Village's municipal tax lien and the two federal tax liens. Generally, in North Carolina, municipal tax liens are superior to federal tax liens. Title 26 of the United States Code Section 6323(b)(6) governs the validity of federal tax liens and provides as follows:

> (b) Protection for certain interests even though notice filed.--Even though notice of a lien imposed by section 6321 has been filed, *such lien shall not be valid*--
>
> [. . .]
>
> (6) Real property tax and special assessment liens.--With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interest in such property which are prior in time, and such lien secures payment of--

> (A) a tax of general application levied by any taxing authority based upon the value of such property;

26 U.S.C. § 6323(b)(6) (2012). North Carolina law grants priority to the local tax liens described in Section 6323(b)(6) over federal tax liens:

> (a) On Real Property.–The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:
>
> (1) Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes, the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.

N.C. Gen. Stat. § 105-356(a)(1) (2015). Therefore, a federal tax lien is junior to any local tax lien.

Generally, foreclosure of a senior lien extinguishes all junior liens. *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967) ("Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument.") (citing *St. Louis Union Trust Co. v. Foster*, 211 N.C. 331, 190 S.E. 522 (1937)). To ensure a valid foreclosure sale, a senior lien holder must follow certain procedures. N.C. Gen. Stat. § 1-339.1 *et seq.* governs the procedures for judicial foreclosure sales, however, where property is subject to a federal tax lien, federal law imposes additional procedures.

The general rule making federal tax liens inferior to local tax liens applies only when the United States is provided prior notice of a foreclosure sale arising from a local tax liability. 26 U.S.C. § 7425(a) (2012) provides that a senior lien holder foreclosing on property subject to a federal tax lien must provide the United States with notice prior to the foreclosure sale. If the United States has not been provided notice of a judicial foreclosure proceeding, any federal tax lien on the foreclosed property remains undisturbed. 26 U.S.C. § 7425(a) provides in pertinent part:

> (a) Judicial proceedings.--If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of Title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title--
>
> (1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced . . . .

When federal and state law conflict, *i.e.*, "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[,]" federal law preempts state law. *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 44-45, 681 S.E.2d 465, 476 (2009). Therefore, a foreclosure proceeding and sale will not disturb or extinguish a previously recorded federal tax lien unless the United States is properly notified and made a party to the proceeding. *See, e.g.*, *Myers v. U.S.*, 647 F.2d 591, 596-97 (5th Cir. 1981) ("Although under state law the inferior mortgages and liens were discharged by the foreclosure sale, . . . if the proper type of notice required by federal statute is not afforded where so required, the federal tax lien then remains unaffected by the foreclosure process and will follow the property into the hands of the subsequent purchaser . . . .").

It is undisputed that the federal tax liens against the Parcel were properly issued and recorded in the Avery County Register of Deeds Office on 29 December 2011 and 4 September 2012. Approximately one year later, and before the federal liens were discharged, the Village filed a complaint in Avery County District Court and was granted a Default Judgment for a tax deficiency on the Parcel. The undisputed facts further establish that the United States was not made a party to the judicial foreclosure proceedings that followed the Default Judgment. Therefore, the federal tax liens survived the judicial foreclosure sale and Defendant took the Parcel subject to these liens.

The United States and the Internal Revenue Service have a right to levy and sell any real property in an effort to collect on unpaid taxes. 26 U.S.C. § 6330 *et seq.* (2012) "The term 'levy' as used in this title includes the power of distraint and seizure by any means." 26 U.S.C. § 6331(b). Following a sale pursuant to Section 6335, "[t]he owners . . . *or any person having any interest therein*, . . . shall be permitted to redeem the property sold, or any particular tract of such property, at

any time within 180 days after the sale thereof." 26 U.S.C. § 6337(b)(1) (emphasis added).

Defendant's purchase of the Parcel as the upset bidder from the 13 November 2013 foreclosure sale discharged the local tax lien and Defendant was conveyed a quitclaim deed by the Village. "A quitclaim deed conveys only the interest of the grantor, whatever it is, no more and no less." *Heath v. Turner*, 309 N.C. 483, 491, 308 S.E.2d 244, 248 (1983) (citing *Hayes v. Ricard*, 245 N.C. 687, 691, 97 S.E.2d 105, 108 (1952)).

Because the Village's foreclosure action and judicial foreclosure sale violated federal law by failing to provide notice to, and joining as a party, the United States, and occurred prior to the federal tax lien foreclosure sale, Defendant's quitclaim deed was conveyed subject to the federal tax lien. Defendant's deed granted it the right to redeem the Parcel from the federal tax foreclosure sale pursuant to 26 U.S.C. § 6337, quoted *supra*. However, Defendant failed to redeem within the 180 days prescribed by law, and therefore, forfeited any rights it had to the Parcel.

Because Defendant's claim to the Parcel based upon the quitclaim deed was subordinate to Plaintiff's claim based upon the superior federal tax lien, North Carolina's recordation statute, N.C. Gen. Stat. § 47-18(a), does not apply. Winning the race to the courthouse does not upset the rules of lien priority established by state and federal law, including federal preemption when those laws conflict.

Defendant was put on notice of the federal tax lien foreclosure sale following the judicial foreclosure sale and had the opportunity to exercise its right to redeem the Parcel. However, Defendant did not exercise this right within the redemption period and consequently severed its claim to the Parcel. Defendant's argument that the discharge of the federal lien as to Plaintiff, as a result of the federal tax foreclosure sale, also extinguished the lien as to Defendant is without merit.

III. Conclusion

For the reasons stated above we affirm the trial court's order granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment and Judgment as a Matter of Law.

AFFIRMED.

Judges DIETZ and TYSON concur.

SONYA PAIT HEUSTESS, ADMINISTRATRIX OF THE ESTATE OF RONNIE WAYNE HEUSTESS, PLAINTIFF

v.

BLADENBORO EMERGENCY SERVICES, INCORPORATED, D/B/A BLADENBORO RESCUE; LYNDA A. SANDERS, INDIVIDUALLY; DAVID D. HOWELL, IN HIS OFFICIAL CAPACITY AS A EMERGENCY MEDICAL TECHNICIAN WITH BLADENBORO EMERGENCY SERVICES, INCORPORATED, AND INDIVIDUALLY; JEFFERY BRISSON, IN HIS OFFICIAL CAPACITY AS A EMERGENCY MEDICAL TECHNICIAN WITH BLADENBORO EMERGENCY SERVICES, INCORPORATED AND INDIVIDUALLY; AND HOLLIS FREEMAN, IN HIS OFFICIAL CAPACITY AS A EMERGENCY MEDICAL TECHNICIAN WITH BLADENBORO EMERGENCY SERVICES, INCORPORATED AND INDIVIDUALLY, DEFENDANTS

No. COA16-106

Filed 20 September 2016

1. Appeal and Error—interlocutory orders and appeals—motion for change of venue—substantial right

Although an appeal from the denial of a motion to change venue is from an interlocutory order, it affects a substantial right and is immediately appealable.

2. Venue—motion to change—part of cause of action in county

The trial court did not err by denying defendants' motion to change venue. Although plaintiff alleged other negligent acts and omissions that occurred in Bladen County, venue was proper in Robeson County since part of the cause of action arose there.

Appeal by defendants from Order entered 29 June 2015 by Judge Mary Ann Tally in Robeson County Superior Court. Heard in the Court of Appeals 10 August 2016.

MUSSELWHITE, MUSSELWHITE, BRANCH & GRANTHAM, by J. William Owen and W. Edward Musselwhite, Jr., for plaintiff.

CRANFILL SUMNER & HARTZOG LLP, by Jaye E. Bingham-Hinch, Colleen N. Shea, and Elizabeth C. King, for defendants.

ELMORE, Judge.

Defendants[1] appeal from the trial court's order denying their motion to change venue. After careful consideration, we affirm.

1. Defendant Lynda A. Sanders did not file a notice of appeal.

I. Background

This appeal arises out of an action filed in Robeson County by Sonya Heustess (plaintiff), administratrix of the estate of Ronnie Wayne Heustess (the decedent), against Bladen County; Bladen County Emergency Services (EMS), a department of Bladen County; Bladenboro Emergency Services, Inc. d/b/a Bladenboro Rescue (Bladenboro EMS); Lynda A. Sanders in her official capacity as a paramedic with Bladen County EMS and individually; David D. Howell in his official capacity as an emergency medical technician (EMT) with Bladenboro EMS and individually; Jeffery Brisson in his official capacity as an EMT with Bladenboro EMS and individually; and Hollis Freeman in his official capacity as an EMT with Bladenboro EMS and individually. Plaintiff later voluntarily dismissed without prejudice all claims against Bladen County, Bladen County EMS, and Sanders in her official capacity.

In plaintiff's complaint, she alleged that in February 2013, her husband, the decedent, began to experience abdominal pain and shortness of breath, and soon thereafter collapsed in their home. Plaintiff summoned the help of their daughter's boyfriend, an off-duty paramedic, who was sleeping in their daughter's house next door. Plaintiff also called the Bladen County 911 operator. Bladen County EMS and Bladenboro EMS were dispatched to the home in Bladen County and stayed on the scene for approximately twenty-six minutes before departing for Southeastern Regional Medical Center in Robeson County. A hospital physician informed plaintiff's family that he believed the decedent had a heart attack, but he was unable to treat the decedent due to "bleeding of the brain caused by the lack of oxygen to the brain." Plaintiff alleged that Sanders, Howell, Brisson, and Freeman, as agents of their respective employers, failed to do the following: comply with the applicable protocols set forth by the North Carolina Office of EMS and Bladen County EMS; ensure that the decedent was properly intubated and that such intubation was properly monitored; make sure that the "king airway" was properly inserted and monitored while en route to the hospital; and take all necessary action to make sure the decedent received adequate oxygen.

Bladenboro EMS, Sanders, Howell, Brisson, and Freeman filed a motion to dismiss or, alternatively, to change venue to Bladen County pursuant to N.C. Gen. Stat. § 1-83(1), claiming that venue was not proper in Robeson County. After a hearing, the Robeson County Superior Court denied the motion and concluded that venue was proper in Robeson County, as alleged in plaintiff's complaint, pursuant to N.C. Gen. Stat.

§ 1-77. Bladenboro EMS, Howell, Brisson, and Freeman (collectively defendants) appeal.

II. Analysis

Defendants argue that the trial court erred in denying their motion to change venue because Robeson County is not the proper venue for this action. Defendants contend that venue is governed by N.C. Gen. Stat. § 1-82 whereas plaintiff alleges that N.C. Gen. Stat. § 1-77 controls.

[1] At the outset, we acknowledge that an order denying a motion to change venue is interlocutory, and interlocutory orders are generally not immediately appealable. *See Hawley v. Hobgood*, 174 N.C. App. 606, 607–08, 622 S.E.2d 117, 118 (2005) (citing *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). Our courts have established, however, that "[m]otions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable." *Id.* at 608, 622 S.E.2d at 119 (citations omitted).

[2] Defendants filed a motion for change of venue under N.C. Gen. Stat. § 1-83 (2015), which states,

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one. . . .

"Despite the use of the word 'may,' it is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)). "A determination of venue under

N.C. Gen. Stat. § 1-83(1) is, therefore, a question of law that we review *de novo*." *Id.* (citations omitted).

Under N.C. Gen. Stat. § 1-77 (2015),

> Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

However, "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ." N.C. Gen. Stat. § 1-82 (2015).

Here, the trial court concluded as a matter of law that N.C. Gen. Stat. § 1-77(2) applies, in that there was "an agency relationship between Bladen County and Bladenboro [EMS] for purposes of venue under N.C. Gen. Stat. § 1-77(2)." Additionally, it concluded that plaintiff's allegations were sufficient to establish that part of plaintiff's cause of action arose in Robeson County.

Our Supreme Court has stated that "[a]ny consideration of G.S. 1-77(2) involves two questions: (1) Is defendant a 'public officer or person especially appointed to execute his duties'? (2) In what county did the cause of action in suit arise?" *Coats v. Sampson Cty. Mem. Hosp., Inc.*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965) (holding that the defendant-hospital was an agency of Sampson County and venue was proper in Sampson County under N.C. Gen. Stat. § 1-77); *see also Wells v. Cumberland Cty. Hosp. Sys., Inc.*, 150 N.C. App. 584, 587, 564 S.E.2d 74, 76 (2002).

Defendants argue that N.C. Gen. Stat. § 1-77 does not apply because plaintiff dismissed the three "County defendants" and failed to allege or present any evidence that the remaining defendants were public officers within the meaning of section 1-77. Defendants rely on our holding in *Fraley v. Griffin*, 217 N.C. App. 624, 629, 720 S.E.2d 694, 697 (2011), to support their argument. In that case, this Court held that the defendant, an EMT, was not entitled to public official immunity and could be held

personally liable for any harm caused by his negligence as an EMT. *Id.* For the following reasons, *Fraley* is not controlling here.

In *Hyde v. Anderson*, 158 N.C. App. 307, 309–10, 580 S.E.2d 424, 425 (2003), this Court observed that the test for whether a party can be considered a public officer for purposes of venue does not take into account the test for finding immunity. In *Hyde*, the plaintiff argued that "the correct test for determining if section 1-77(2) applies should be whether a municipality is engaged in a proprietary function or a governmental function." *Id.* We stated, "Although we acknowledge this is the proper test for determining whether a governmental actor is entitled to sovereign immunity, . . . we discern no basis for applying it to determinations of venue in suits against a municipality." *Id.* at 310, 580 S.E.2d at 425.

Here, plaintiff claims that there was an agency relationship between Bladen County, a government entity, and Bladenboro EMS, a nonprofit corporation, and that Bladenboro EMS was serving the "essential government and public function" of providing emergency medical care to Bladen County citizens.

"In determining whether a corporate entity should be treated as an agency of local government, 'we . . . must look at the nature of the relationship between the [corporation] and the county[.]' " *Odom v. Clark*, 192 N.C. App. 190, 195, 668 S.E.2d 33, 36 (2008) (quoting *Publishing Co. v. Hosp. Sys., Inc.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548 (1981)). Under N.C. Gen. Stat. § 143-507 (2015), the General Assembly established a "Statewide Emergency Medical Services System" in the Department of Health and Human Services as follows:

> Emergency Medical Services as referred to in this Article include all services rendered by emergency medical services personnel as defined in G.S. 131E-155(7) in responding to improve the health and wellness of the community and to address the individual's need for immediate emergency medical care in order to prevent loss of life or further aggravation of physiological or psychological illness or injury.

N.C. Gen. Stat. § 131E-155(7) (2015) states that "[e]mergency medical services personnel" include an EMT, which is defined in N.C. Gen. Stat. § 131E-155(10) (2015) as "an individual who has completed an educational program in emergency medical care approved by the Department and has been credentialed as an emergency medical technician by the Department." *See also* N.C. Gen. Stat. § 131E-158 (2015)

("Credentialed personnel required."); N.C. Gen. Stat. § 131E-159 (2015) ("Credentialing Requirements.").

Moreover, "[e]ach county shall ensure that emergency medical services are provided to its citizens[,]" N.C. Gen. Stat. § 143-517 (2015), and "a county may operate or contract for ambulance services in all or a portion of the county." N.C. Gen. Stat. § 153A-250(b) (2015). The "Regulation of Emergency Medical Services" is provided for in Chapter 131E, Article 7 of our General Statutes. N.C. Gen. Stat. § 131E-156(a) (2015) provides,

> No person, firm, corporation, or association, either as owner, agent, provider, or otherwise, shall furnish, operate, conduct, maintain, advertise, or otherwise engage in or profess to be engaged in the business or service of transporting patients upon the streets or highways, waterways or airways in North Carolina unless a valid permit from the Department has been issued for each ambulance[2] used in the business or service.

Similarly, "No firm, corporation, or association shall furnish, operate, conduct, maintain, advertise, or otherwise engage in or profess to provide emergency medical services or transport patients upon the streets or highways, waterways, or airways in North Carolina unless a valid EMS Provider License has been issued by the Department." N.C. Gen. Stat. § 131E-155.1(a) (2015).

Consistent with the statutes cited above, here, Bladenboro EMS and Bladen County entered into a contract signed by the Chairman of the Board of Directors of Bladenboro EMS and the Chairman of the Board of Commissioners of Bladen County. Pursuant to that contract, both parties agreed that Bladenboro EMS would "furnish and provide continuing EMS services to all individuals lying within the boundaries of the Bladenboro EMS [ ] response area by dispatching upon call of any individual within the response area, with adequate equipment and personnel." While defendants claim that Bladenboro EMS was in complete "control of its vehicles, programs, volunteers, assistants and employees[,]" Bladenboro EMS was subject to the regulations provided in the statutes discussed above. Furthermore, in order to satisfy its own statutory duty to "ensure that emergency medical services are provided to its citizens[,]" N.C. Gen. Stat. § 143-517, Bladen County entered into a contract with Bladenboro EMS. Based on the nature of the relationship between Bladenboro EMS

2. The definition of "ambulance" in N.C. Gen. Stat. § 131E-155(1a) (2015) includes any privately or publicly owned vehicle.

and Bladen County, we conclude that Bladenboro EMS is an agency of Bladen County for purposes of venue here.

Additionally, although defendants argue that the alleged omissions giving rise to the cause of action occurred only in Bladen County, plaintiff alleged in her complaint that defendants failed to properly monitor the decedent and make sure that he had adequate oxygen while defendants transported him from plaintiff's home in Bladen County to the hospital in Robeson County. Plaintiff alleged that upon arriving at the hospital, a physician removed the king airway device and re-intubated the decedent. Plaintiff further alleged that the decedent died as a result of his brain being deprived of oxygen.

Even though plaintiff alleged other negligent acts and omissions that she claimed occurred in Bladen County, because part of the cause of action arose in Robeson County, venue is proper in Robeson County under N.C. Gen. Stat. § 1-77(2). *See Coats*, 264 N.C. at 334, 141 S.E.2d at 492 (" 'A broad, general rule applied or stated in many cases is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' " (quoting Annot., Venue of actions or proceedings against public officers, 48 A.L.R. 2d 423, 432)); *see also Frink v. Batten*, 184 N.C. App. 725, 726, 730, 646 S.E.2d 809, 810, 812 (2007) (noting that section 1-77, which states that venue exists " 'where the cause, or some part thereof, arose,' acknowledges that those acts and omissions may arise in multiple counties" and "one of the sets of defendants will be required to litigate the case outside their home county").

Defendants also claim that the trial court erred in failing to rely on the affidavit of David D. Howell, dated 21 May 2015, and in making findings of fact and conclusions of law that were in conflict with his sworn testimony. "[T]he trial court in ruling upon a motion for change of venue is entirely free to either believe or disbelieve affidavits such as those filed by the defendants without regard to whether they have been controverted by evidence introduced by the opposing party." *Godley Const. Co. v. McDaniel*, 40 N.C. App. 605, 608, 253 S.E.2d 359, 361 (1979) (citations omitted). The trial court was not required to rely on, or find facts and enter conclusions of law in accordance with, Howell's affidavit.

III. Conclusion

The trial court did not err in denying defendants' motion to change venue.

AFFIRMED.

Judges DAVIS and DIETZ concur.

STATE v. ELDRIDGE

[249 N.C. App. 493 (2016)]

STATE OF NORTH CAROLINA
v.
ANTWON LEERANDALL ELDRIDGE

No. COA16-173

Filed 20 September 2016

Search and Seizure—vehicle stop—reasonable suspicion—officer's mistake of law

The trial court erred in a trafficking in cocaine by transportation and trafficking in cocaine by possession case by denying defendant's motion to suppress evidence discovered during the stop of his vehicle. The requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that, like defendant's vehicle, are registered in another state. The officer's mistake of law was not objectively reasonable.

Appeal by defendant from judgment entered 3 August 2015 by Judge Edwin G. Wilson, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 24 August 2016.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State.*

Kimberly P. Hoppin for defendant-appellant.

DAVIS, Judge.

Antwon Leerandall Eldridge ("Defendant") appeals from his convictions for trafficking in cocaine by transportation and trafficking in cocaine by possession. On appeal, Defendant argues that the trial court erred in denying his motion to suppress evidence discovered during the stop of his vehicle because the stop was based on an officer's mistake of law that was not objectively reasonable. After careful review, we reverse the trial court's order denying Defendant's motion to suppress.

Factual Background

On 12 June 2014, Deputy Aaron Billings of the Watauga County Sheriff's Office was traveling northbound on U.S. Highway 421 while talking on the phone to his supervisor, Lieutenant Brandon Greer. As he was driving, Deputy Billings noticed a white Ford Crown Victoria

driving without an exterior mirror on the driver's side of the vehicle. The vehicle was registered in Tennessee.

Deputy Billings was aware that North Carolina law generally requires vehicles to be equipped with exterior mirrors on the driver's side. He asked Lieutenant Greer to confirm that the applicable statute did, in fact, require the presence of an exterior mirror on the driver's side of a vehicle, and Lieutenant Greer responded that Deputy Billings was correct. Neither Deputy Billings nor Lieutenant Greer was aware that this statutory requirement — which is codified in N.C. Gen. Stat. § 20-126(b) — does not apply to vehicles registered out of state. Deputy Billings proceeded to perform a traffic stop on the Crown Victoria in a nearby parking lot.

Deputy Billings approached the vehicle and found Defendant in the driver's seat. Defendant consented to a search of the car, and officers later found 73 grams of crack cocaine and 12 grams of marijuana inside the vehicle. Defendant was arrested and subsequently admitted his awareness of the presence of the drugs in the vehicle.

On 2 February 2015, Defendant was indicted for trafficking in cocaine by transportation, trafficking in cocaine by possession, and possession with intent to manufacture, sell, or deliver cocaine. Defendant filed a motion to suppress evidence obtained during the 12 June 2014 traffic stop, and a hearing was held on 4 June 2015 in Watauga County Superior Court before the Honorable Eric Morgan.

At the hearing, Deputy Billings testified that at the time of the stop he genuinely believed that the statutory provision requiring exterior mirrors applied to Defendant's vehicle. However, he conceded that he had since learned that the statute was not actually applicable because the Crown Victoria was not registered in North Carolina. Lieutenant Greer similarly testified that he had been unaware on the date at issue that the statutory requirement applied only to vehicles registered in North Carolina.

On 5 June 2015, the trial court entered an order denying Defendant's motion to suppress, which contained the following findings of fact:

> 1. Deputy Aaron Billings is a seven and a half year veteran of the Watauga County Sheriff's Department.
>
> 2. Deputy Billings was in uniform and on patrol at 10:42 PM on June 12, 2014.

3. Deputy Billings encountered the Defendant's vehicle on U.S. Highway 421 in Watauga County. U.S. Highway 421 is a public roadway.

4. Prior to stopping the Defendant, Deputy Billings noticed there was no exterior mirror on the driver's side of the vehicle. Upon closer examination, Deputy Billings noticed there was also no exterior mirror on the passenger side of the vehicle.

5. The Defendant's vehicle was registered in the State of Tennessee.

6. Deputy Billings had a reasonable and good faith belief that the condition of the Defendant's vehicle violated N.C.G.S. § 20-126(b).

7. Other subsections of N.C.G.S. § 20-126, which regulates mirrors on vehicles, do not require a vehicle to be registered in North Carolina to apply. For example, N.C.G.S. § 20-126(a) requires rearview mirrors in vehicles, but does not include a requirement that the vehicle be registered in North Carolina. In addition, N.C.G.S. § 20-126(c) requires rearview mirrors on motorcycles, but does not include a requirement that the vehicle be registered in North Carolina.

8. Lieutenant Brandon Greer also testified. Lieutenant Greer has twelve years of law enforcement experience and was Deputy Billings[']s supervisor on June 12, 2014.

9. Lieutenant Greer testified that Deputy Billings contacted Lieutenant Greer prior to conducting the traffic stop of the Defendant.

10. Lieutenant Greer informed Deputy Billings that he believed the absence of exterior mirrors on the Defendant's vehicle violated N.C.G.S. § 20-126(b).

Based on these findings of fact, the trial court made the following conclusions of law:

1. Deputy Billings stopped the Defendant based on an objectively reasonable mistake of law that N.C.G.S. § 20-126(b) applied to the Defendant's vehicle even though it was registered in Tennessee and not North Carolina.

> This was a reasonable and good faith, but mistaken understanding of the scope of the legal prohibition of N.C.G.S. § 20-126(b).
>
> 2. The purpose of N.C.G.S. § 20-126(b) is to ensure the safety of motor vehicles and their drivers on North Carolina roads. This purpose would not lead an officer to believe that N.C.G.S. § 20-126(b) applies only to vehicles registered in North Carolina.
>
> 3. Deputy Billings's traffic stop of the Defendant for violating N.C.G.S. § 20-126(b) was a reasonable mistake of law within the meaning of Heien v. North Carolina, 135 S. Ct. 530 (2014), and Deputy Billings had a reasonable suspicion that justified the traffic stop of the Defendant.

On 3 August 2015, Defendant entered an *Alford* plea to trafficking in cocaine by transportation and trafficking in cocaine by possession but preserved his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to 35 to 51 months imprisonment. Defendant gave oral notice of appeal in open court.[1]

Analysis

Defendant's sole argument on appeal is that the trial court erred in concluding that Deputy Billings's decision to stop Defendant's vehicle was based on a reasonable mistake of law and therefore constituted sufficient grounds for the traffic stop. The State concedes error on this point, and we agree that the stop was unlawful.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. Miller*, __ N.C. App. __, __, 777 S.E.2d 337, 340 (2015) (citation and quotation marks omitted).

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1. Defendant has filed a petition for *certiorari* asking this Court to consider his appeal despite any "technical defect" in his notice of appeal. However, because it appears from the record that Defendant's notice of appeal was properly given, we deny the petition for *certiorari* as moot.

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L.Ed.2d 570, 576 (2000). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (citation and quotation marks omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008). Investigatory traffic stops "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Our Supreme Court has held that "[a] court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory traffic stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (citation and quotation marks omitted).

Under North Carolina law,

> (b) It shall be unlawful for any person to operate upon the highways of this State any vehicle manufactured, assembled or first sold on or after January 1, 1966 *and registered in this State* unless such vehicle is equipped with at least one outside mirror mounted on the driver's side of the vehicle. Mirrors herein required shall be of a type approved by the Commissioner.

N.C. Gen. Stat. § 20-126(b) (2015) (emphasis added).

The key question in this appeal is whether Deputy Billings's genuine — but mistaken — belief that N.C. Gen. Stat. § 20-126(b) applied to Defendant's vehicle provided reasonable suspicion for the traffic stop. Our resolution of this issue is controlled by the United States Supreme Court's decision in *Heien v. North Carolina*, __ U.S. __, 135 S. Ct. 530, 190 L.Ed.2d 475 (2014). In *Heien*, a law enforcement officer stopped a vehicle because its left brake light was not working. The defendant, who was both a passenger in the vehicle and its owner, consented to a search of the vehicle. During the search, the officer found a sandwich bag containing cocaine in a duffel bag located inside the car, and the defendant was arrested. After being charged with attempted trafficking in cocaine, the defendant moved to suppress the evidence, contending that the traffic stop violated the Fourth Amendment. The defendant's motion was denied. *Id.* at __, 135 S. Ct. at 534-35, 190 L.Ed.2d. at 480-81.

On appeal, this Court held that the denial of the motion to suppress had been improper, ruling that the statute at issue merely required vehicles to have at least one working brake light, which the defendant's vehicle clearly did. *Id.* at __, 135 S. Ct. at 535, 190 L.Ed.2d. at 481. Our Supreme Court reversed, concluding that even though having one faulty brake light was not a violation of the statute, the officer "could have reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order[.]" *Id.* at __, 135 S. Ct. at 535, 190 L.Ed.2d. at 481.

The United States Supreme Court upheld the validity of the traffic stop, holding that an officer's "mistake of law can . . . give rise to the reasonable suspicion necessary to uphold [a] seizure under the Fourth Amendment." *Id.* at __, 135 S. Ct. at 534, 190 L.Ed.2d at 480. In so holding, the Supreme Court distinguished between reasonable and unreasonable mistakes of law, explaining that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved." *Id.* at __, 135 S. Ct. at 540, 190 L.Ed.2d at 486.

In analyzing the applicable North Carolina statute regulating brake lights, the Court had "little difficulty concluding that the officer's error of law was reasonable." *Id.* at __, 135 S. Ct. at 540, 190 L.Ed.2d at 486. The Court focused on the lack of clarity in the statutory text and noted the absence of prior caselaw from North Carolina courts interpreting this statutory provision. *Id.* at __, 135 S. Ct. at 540, 190 L.Ed.2d at 487. In its opinion, the Court stated the following regarding the ambiguity of the statute:

> Although the North Carolina statute at issue refers to "a stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N.C. Gen. Stat. Ann. § 20-129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," § 20-129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Id. at __, 135 S. Ct. at 540, 190 L.Ed.2d at 486-87.

The present appeal provides this Court with its first opportunity to apply *Heien*. We are guided in this endeavor by decisions from a number of courts in other jurisdictions that have interpreted *Heien* in analogous contexts. These cases establish that in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous. *See, e.g.*, *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016) ("The statute isn't ambiguous, and *Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute."); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015) ("If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes." (citation omitted)); *Flint v. City of Milwaukee*, 91 F. Supp. 3d 1032, 1057 (E.D. Wis. 2015) ("There also appears, in this Court's view, to be a condition precedent to even asserting that a mistake of law is reasonable. That is, as stated by Justice Kagan in her concurrence, that the statute be genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work." (citation and quotation marks omitted)).

Moreover, some courts applying *Heien* have further required that there be an absence of settled caselaw interpreting the statute at issue in order for the officer's mistake of law to be deemed objectively reasonable. *See, e.g.*, *United States v. Alvarado-Zarza*, 782 F.3d 246, 250 (5th Cir. 2015) (where statute required use of turn signal in advance of making a turn and prior caselaw interpreting the statute distinguished between turns and lane changes, officer's stop of defendant's vehicle for failing to signal before changing lanes — as opposed to turning — was not objectively reasonable mistake of law under *Heien*); *United States v. Sanders*, 95 F. Supp. 3d 1274, 1284-86 (D. Nev. 2015) (although statute proscribing obstruction of rear view mirror was ambiguous, prior caselaw had interpreted virtually identical statute such that officer's stop of defendant's vehicle for obstructing rear view mirror was therefore not objectively reasonable mistake of law); *People v. Gaytan*, 32 N.E.3d 641, 650-53 (Ill. 2015) (where statute prohibiting certain materials from being attached to license plate was ambiguous and "no prior appellate case had addressed the scope of [the statute] with respect to trailer hitches[,]" officer's mistake of law was objectively reasonable).

Unlike the statutory language at issue in *Heien*, the text of N.C. Gen. Stat. § 20-126(b) is clear and unambiguous. The phrase "registered in this State" as used in this statutory provision is susceptible to only one

meaning — that is, the vehicle must be registered in North Carolina in order for the requirements of N.C. Gen. Stat. § 20-126(b) to apply. Thus, a reasonable officer reading this statute would understand the requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that — like Defendant's vehicle — are registered in another state.

Because we conclude that Deputy Billings's mistake of law was not objectively reasonable under the standard set out in *Heien*, no reasonable suspicion existed to support the stop of Defendant's vehicle. Therefore, the trial court erred in denying Defendant's motion to suppress. *See State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014) (reversing trial court's order denying motion to suppress and remanding for order vacating defendant's guilty plea).

Conclusion

For the reasons stated above, the trial court erred in denying Defendant's motion to suppress. Accordingly, we reverse the trial court's 5 June 2015 order and remand for entry of an order vacating Defendant's guilty plea.

REVERSED AND REMANDED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
HEATH TAYLOR GERARD, DEFENDANT

No. COA15-1014

Filed 20 September 2016

Pornography—child pornography—search warrant

Where defendant was convicted of six counts of third-degree sexual exploitation of a minor, the trial court did not err by denying his motion to suppress. The warrant application and affidavit provided sufficient information for the magistrate to make an independent and neutral determination.

Appeal by defendant from judgments entered 7 May 2013 and order entered 20 May 2013 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General Derrick C. Mertz, for the State.

Tim Fulton Walker & Owen, PLLC, by Melissa Owen, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying his motion to suppress and judgments convicting him of six counts of third degree sexual exploitation of a minor. The trial court erred in basing its determination upon the good faith exception under North Carolina General Statute § 15A-974 but reached the correct result by denying the motion to suppress, since the search warrant application and affidavit provided sufficient information for the magistrate to make an independent and neutral determination that probable cause existed for the issuance of the warrant which led to the search of defendant's computer and discovery of child pornography. Therefore, we affirm.

I. Background

The background of this case was summarized by this Court in *State v. Gerard*, 233 N.C. App. 599, 758 S.E.2d 903 (2014) (unpublished) ("*Gerard I*"). In summary, defendant

> was indicted on 7 June 2010 for six counts of third-degree sexual exploitation of a minor. Detective C.E. Perez ("Detective Perez"), of the Charlotte–Mecklenburg Police Department, obtained a search warrant on 14 April 2010 to conduct a search of Defendant's residence. Defendant filed a motion on 3 April 2013 to suppress evidence seized during the 14 April 2010 search of his residence.

Id. Thereafter, the trial court considered defendant's motion to suppress, and "[i]n an order entered on 20 May 2013, the trial court . . . concluded that the good faith exception applied and denied Defendant's motion to suppress. Defendant entered a plea of guilty pursuant to *Alford* decision to six counts of third-degree sexual exploitation of a minor. Defendant appeals." *Id.* (quotation marks omitted).

This Court dismissed defendant's appeal because defendant had "failed to give notice of his intention to appeal[.]" *Id.* Thereafter, defendant filed a petition for writ of certiorari which this Court "allowed for the purpose of reviewing the judgments entered 7 May 2013 and the amended order entered 20 May 2013 by Judge Yvonne Mims Evans. Such

review shall be limited to issues related to the denial of defendant's motion to suppress."

II. Motion to Suppress

Defendant first contends that "the trial court erred in denying Mr. Gerard's motion to suppress on the ground that probable cause existed to issue a search warrant." (Original in all caps.) Relying primarily on North Carolina General Statutes §§ 15A-244 and 245, defendant argues that the information in the affidavit supporting the search warrant application did not include sufficiently detailed facts and circumstances to support a determination that probable cause existed for issuance of the warrant.

> In ruling upon a motion to suppress evidence, the trial court must set forth in the record its findings of fact and conclusions of law. The general rule is that the trial court should make findings of fact to show the bases of its ruling. The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. Conclusions of law are reviewed *de novo*.

State v. McCrary, 237 N.C. App. 48, 51–52, 764 S.E.2d 477, 479–80 (2014) (citations, quotation marks, ellipses, and brackets omitted), *aff'd in part and remanded*, ___ N.C. ___, 780 S.E.2d 554 (2015).

Defendant does not challenge the trial court's findings of fact. The State has not presented any proposed issue challenging any of the trial court's findings of fact as an alternative basis under North Carolina Rule of Appellate Procedure 10(c) to affirm the ruling, although the State does note

> that the trial court's finding of fact [27] regarding the sufficiency of the information set forth in the warrant . . . is more termed a conclusion of law, and appears to conflict with its actual finding of fact regarding a reasonable reading as a whole of the facts set forth in the affidavit.

(Quotation marks and footnote omitted)).

The trial court's first 17 findings of fact set forth in detail Detective Perez's extensive training and experience as a police officer and certified computer forensics examiner; a description of the Operation Peer Precision internet operation to identify child pornography; how SHA1

values are used to identify child pornography files on the internet; how Detective Perez identified the particular IP address as sharing known child pornography files; his download and review of some of the images and comparisons of SHA1 values to confirm that the files were child pornography; his identification of the address to which the IP address was registered; and his preparation of the search warrant application. Many of the details in findings of fact 1-17 were based upon Detective Perez's testimony.

The remaining findings of fact essentially explain where Detective Perez's affidavit was lacking as compared to his testimony:

> 18. The search warrant application and affidavit of probable cause presented to the magistrate on April 14, 2010, had significantly less detailed information than the foregoing 17 Findings of Fact. The application did name the officer applying for the warrant and the items to be seized. It described the premises to be searched and gave an address for the premises. The application suggests that the search will produce evidence of the crime of third-degree sexual exploitation of a minor as defined in N.C.G.S. 14-190.17A. The basic requirements for applying for the warrant are met.
>
> 19. The probable-cause affidavit did not describe Detective Perez's training and experience as a certified computer forensics examiner or even his basic training as a police officer.
>
> 20. The affidavit never defines "known child pornography" or use[s] the statutory language set forth in N.C.G.S. 14-190.17A.
>
> 21. The affidavit does not indicate that Detective Perez used Peer Spectre and GnuWatch to identify the seventeen files as child pornography. The affidavit never says that Perez actually opened any of the seventeen files and looked at the images or data. Nor does it describe any of the data or images in the seventeen files.
>
> 22. The affidavit does not name the seventeen files or their SHA 1 values. It does not say the detective actually compared the SHA 1 values of the IP address to known child pornography and that they were an exact match. The affidavit also fails to explain why SHA value comparison is reliable in cyber investigations.

23. The affidavit does not contain any facts to explain the source of Detective Perez's knowledge relating to the SHA values of previously identified child pornography.

24. However, upon reviewing the affidavit as a whole, a reasonable conclusion can be drawn that the way in which Detective Perez knew that the files contained known child pornography was by an SHA value comparison of the SHA values of "previously identified child pornography" and the SHA values of the 17 files on Defendant's computer that were alleged child pornography.

25. The affidavit goes on to explain that based upon the Detective's training and experience, he knows that those who have Internet access often possess computers and other devices capable of storing electronic media.

26. There is no evidence on the face of the application for the search warrant that the magistrate sought additional information from Detective Perez or that he provided any information other than what appears on the face of the document.

Because neither party has challenged any of these findings of fact, even if we tend to disagree with the trial court's description of portions of the affidavit, we must accept the findings of fact as true. *See Alexvale Furniture v. Alexander & Alexander*, 93 N.C. App. 478, 481, 385 S.E.2d 796, 798 (1989) ("It is also the law that a trial court's unchallenged findings of fact are binding upon appeal[.]") In summary, in its previous findings of fact the trial court had determined that, although the trial court found that although there was probable cause for issuance of the search warrant, the facts necessary to establish probable cause were not present in the affidavit, but rather were based upon the more detailed testimony of Detective Perez at the hearing. Ultimately in its last "finding of fact," number 27, which is actually a conclusion of law, the trial court concluded:

27. The Court finds that there was insufficient information in the warrant application and the Detective's affidavit from which the magistrate could make an independent and neutral determination that probable cause existed for the issuance of a warrant. However, the Detective acted in good faith when he and other officers executed the warrant.

Because the last "finding of fact" is actually a conclusion of law, we will review it accordingly. *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) ("The labels findings of fact and conclusions of law employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that finding *de novo*." (citation and quotation marks omitted)).

We must therefore consider de novo whether the trial court properly concluded, based upon its findings of fact, that the search warrant application and affidavit did not present sufficient information "from which the magistrate could make an independent and neutral determination that probable cause existed for the issuance of a warrant." *See McCrary*, 237 N.C. App. at 51–52, 764 S.E.2d at 479. Our Supreme Court has described how we should review issues of this type, noting that the trial court's legal conclusions are "fully reviewable on appeal[:]"

> In so doing, we note that the parties do not challenge the superior court's findings of fact. Therefore, the scope of our inquiry is limited to the superior court's conclusions of law, which are fully reviewable on appeal.
>
> As this Court acknowledged in *State v. Beam*, when addressing whether a search warrant is supported by probable cause, a reviewing court must consider the totality of the circumstances. In applying the totality of the circumstances test, this Court has stated that an affidavit is sufficient if it establishes reasonable cause to believe that the proposed search probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty. Thus, under the totality of the circumstances test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.
>
> In adhering to this standard of review, we are cognizant that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review. We are also mindful that:

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.
>
> Most importantly, we note that a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant. To that end, it is well settled that whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required.

State v. Sinapi, 359 N.C. 394, 397–99, 610 S.E.2d 362, 365 (2005) (citations, quotation marks, ellipses, and brackets omitted).

Defendant insists that Detective Perez's affidavit did not contain sufficient information for a magistrate to determine there was probable cause, and the trial court agreed, as it concluded that "there was insufficient information in the warrant application and the Detective's affidavit from which the magistrate could make an independent and neutral determination that probable cause existed for the issuance of a warrant." The State argues that "the warrant application was sufficient for both probable cause, and thus – under the proper standard of deference – to support the magistrate's issuance of the warrant under the statute."

The trial court was correct that Detective Perez's testimony was more detailed than his affidavit, and the additional information makes the existence of probable cause entirely clear, but the fact that Detective Perez gave such detailed testimony about his law enforcement experience and the forensic computer investigations of transmissions of child pornography over the internet does not make his affidavit insufficient. The trial court sets the bar a bit too high by requiring such extensive and detailed information in a search warrant affidavit. *Id.* at 398, 610 S.E.2d at 365 ("[A]n affidavit is sufficient if it establishes reasonable cause to believe that the proposed search probably will reveal the presence upon

the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty."). Our Supreme Court has noted that affidavits must be interpreted in a "commonsense" manner and not in a "hypertechnical" manner. *Id.* The trial court's "hypertechnical," *id.*, interpretation is revealed in findings 21 through 23:

> 21. The affidavit does not indicate that Detective Perez used Peer Spectre and GnuWatch to identify the seventeen files as child pornography. The affidavit never says that Perez actually opened any of the seventeen files and looked at the images or data. Nor does it describe any of the data or images in the seventeen files.
>
> 22. The affidavit does not name the seventeen files or their SHA 1 values. It does not say the detective actually compared the SHA 1 values of the IP address to known child pornography and that they were an exact match. The affidavit also fails to explain why SHA value comparison is reliable in cyber investigations.
>
> 23. The affidavit does not contain any facts to explain the source of Detective Perez's knowledge relating to the SHA values of previously identified child pornography.

Yet in some findings which the trial court relied upon in finding good faith, the trial court recognized the common-sense interpretation of the affidavit:

> 24. However, upon reviewing the affidavit as a whole, a reasonable conclusion can be drawn that the way in which Detective Perez knew that the files contained known child pornography was by an SHA value comparison of the SHA values of "previously identified child pornography" and the SHA values of the 17 files on Defendant's computer that were alleged child pornography.
>
> 25. The affidavit goes on to explain that based upon the Detective's training and experience, he knows that those who have Internet access often possess computers and other devices capable of storing electronic media.

Since the SHA1 values are defined and described in detail in the affidavit itself, it is obvious from the affidavit how Detective Perez identified the images as child pornography, even without the more detailed technical information provided by his testimony. The magistrate was "entitled to draw reasonable inferences from the material supplied to him by" Detective Perez, and considering the affidavit in light of "factual and practical considerations of everyday life on which reasonable and prudent persons" act, *id.* at 399, 610 S.E.2d at 365, the magistrate could have "reasonable cause to believe that the proposed search probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Id.* at 398, 610 S.E.2d at 365.

The trial court also concluded that "the warrant affidavit was 'purely conclusory' in stating that probable cause existed." In support of this conclusion, defendant relies primarily upon *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972), a case also relied upon by the trial court as noted in the order. *Campbell* does not deal with internet pornography but rather with drugs. *See id.* In *Campbell*, the Supreme Court quoted another case in stating, "Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based[.]" *Id.* at 130-31, 191 S.E.2d 756 (citation and quotation marks omitted). In *Campbell*, the affidavit upon which the search warrant was based stated that defendant and two others have "on [their] premises certain property, to wit: illegally possessed drugs (narcotics, stimulants, depressants), which constitutes evidence of a crime, to wit: possession of illegal drugs[.]" *Id.* at 130, 191 S.E.2d 756. The affidavit identified the people who lived in the house and stated that "[t]hey all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers." *Id.*

The Supreme Court noted that

> Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed

> on the described premises—does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched.

Id. at 131, 191 S.E.2d at 756.

The affidavit here is much more detailed than the one in *Campbell*, and it does describe the "underlying circumstances upon which [Detective Perez's] belief is based[.]" *Id.* at 130-31, 191 S.E.2d at 756. Defendant essentially argues that the affidavit must go into even more extensive technical detail than it did regarding the law enforcement methods and software used to identity and track transmissions of child pornography over the internet. And in his motion to suppress, defendant contended that

> for a judicial official to make an independent determination about whether the images are likely child pornography, the judicial official probably must either view the images or receive a detailed description of the images that allows the judicial official to reach an independent conclusion about the content of the images. A statement from the applicant that the images "are child pornography" is most likely insufficient, as it does not provide factual information that the judicial official can use to determine probable cause. . . .
>
> 28. Based on the description as set out in the warrant application, it would be impossible for a reasonable law enforcement officer to determine that any of the files viewed by Det. Perez on December 3, 2009 were actually child pornography. Det. Perez did not include images, videos, or any other files that could have been viewed by the magistrate in order to make a determination of probable cause.

Essentially, defendant argues that identifying the alleged pornographic images as known child pornography based upon the computer information is not enough -- the pictures themselves should be provided with the affidavit. The trial court's finding suggest as much, since the trial court found as one of the affidavit's deficiencies that it "never says that Perez actually opened any of the seventeen files and looked at the

images or data. Nor does it describe any of the data or images in the seventeen files."

They say that a picture is worth a thousand words, and it is true that attaching copies of the allegedly pornographic images to the affidavit might make the existence of probable cause immediately obvious. But this affidavit described the alleged child pornography using methods developed by law enforcement agencies to track known images transmitted over the internet, *without* further harm to the children victimized by the creators and consumers of the pornography by republishing the images.[1] Pictures which fall within the legal definition of child pornography can be difficult to describe, as Justice Stewart of the United States Supreme Court explained,

> I imply no criticism of the Court, which in those cases was faced with *the task of trying to define what may be indefinable*. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it* . . . .

Jacobellis v. Ohio, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 803-04 (1964) (Stewart, J., concurring) (emphasis added) (footnotes omitted). Just like Justice Stewart, *see id.*, Detective Perez knew it when he saw it as well, according to his testimony, but his affidavit also described the use of SHA1 values to identify the images very specifically as confirmed child pornography. Detective Perez's affidavit did not rely solely upon his own perception of the images as child pornography but upon SHA1 values of known child pornography images.

The affidavit included detailed definitions of several technical terms as used in the affidavit, including "internet," "IP Address," "online," "peer-2-peer networks," "SHA1," and "Gnutella." Detective Perez averred that the Charlotte Mecklenburg Police Department Cyber Crime Unit

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1. We also note that even if a photograph were attached or described in graphic detail, the magistrate would have no way to determine whether the person depicted is a real person or a computer-generated image or the person's age. The photographs identified by SHA1, "a mathematical algorithm fingerprint of a computer file[,]" as described in the affidavit, have been "previously identified [as] child pornography[.]"

had conducted an internet operation "and identified a computer at IP address 174.96.87.196 as actively participating in the receipt and/or distribution of known child pornography." "'Known' child pornography is an image that has been presented to the National Center for Missing and Exploited Children and the person in the image has actually been identified and determined to be a child." Detective Perez was able to identify the images as "known child pornography" by the SHA1 values of the images. The affidavit defined SHA1 as an algorithm

> developed by the National Institute of Standards and Technology (NIST), along with the National Security Agency (NSA), for use with the Digital Signature Standard (DSS) as specified within the Secure Hash Standard (SHS). The United States of America has adopted the SHA-1 hash algorithm described herein as a Federal Information Processing Standard. Basically the SHA1 is an algorithm for computing a condensed representation of a message or data file like a fingerprint.

As Detective Perez averred, the IP address "was utilizing a peer to peer file sharing program identified as 'Limewire' to access and share the files, and that at least 17 files out of the 100 files that were being shared from the computer located at IP address 174.96.87.196 were previously identified as known child pornography." The affidavit noted that "Detective Perez was able to establish a direct connection to the" specific IP address, which was later identified by Time Warner Cable as assigned to John Doe at 123 Main Street in Charlotte.[2] Using the SHA1 information to identify the known images of child pornography eliminated the need to attach copies of the images to the affidavit or to present them to the magistrate. Including copies of the images themselves would further perpetuate the very harm the statutes regarding child pornography were intended to prevent.

Although it appears North Carolina's appellate courts have not addressed how detailed the information regarding child pornography in a search warrant affidavit should be, we find the analysis of similar cases by several federal courts instructive. The Court of Appeals for the Fourth Circuit addressed a similar case in *United States v. Wellman*, 663 F.3d 224 (4th Cir. 2011), where the defendant argued that

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2. We have used a pseudonym for the name of the owner of the house in which defendant resided and a false address to protect the identity and safety of the homeowner and other residents of the home.

> the search warrant authorizing the search of his home was defective, because the warrant application failed to include either an exemplar or a description of an image alleged to be child pornography. He contends that in the absence of such information, the application merely contained the officers' conclusions that the material sought constituted child pornography. According to *Wellman*, this defect in the warrant application precluded the reviewing judge from making an independent probable cause determination.

Id. at 227-28. Although the *Wellman* court ultimately based its determination upon the good faith exception, the court discussed and rejected this contention that the images must be included with the affidavit:

> We decline to impose a requirement that a search warrant application involving child pornography must include an image of the alleged pornography. While the inclusion of such material certainly would aid in the probable cause determination, we do not impose a fixed requirement or a bright-line rule, because law enforcement officers legitimately may choose to include a variety of information when submitting a search warrant application. Instead, when considering the merits of a judicial officer's probable cause determination, we will review a search warrant application in its entirety to determine whether the application provided sufficient information to support the issuance of the warrant.

Id. at 228-29 (citation omitted). In fact, the United States Supreme Court long ago rejected the argument that the "magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure." *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 n.5 , 89 L. Ed. 2d 871, 879 n.5 (1986).

Other courts have also addressed the use of SHA1 values in search warrants to identify child pornography which is being transmitted over the internet. Traditional physical searches of papers are entirely different from the digital methods used to identify information transmitted over the internet, not just in investigations of pornography but in many types of investigations:

> Hashing is a powerful and pervasive technique used in nearly every examination of seized digital media. The concept behind hashing is quite elegant: take a large

> amount of data, such as a file or all the bits on a hard drive, and use a complex mathematical algorithm to generate a relatively compact numerical identifier (the hash value) unique to that data. Examiners use hash values throughout the forensics process, from acquiring the data, through analysis, and even into legal proceedings. Hash algorithms are used to confirm that when a copy of data is made, the original is unaltered and the copy is identical, bit-for-bit. That is, hashing is employed to confirm that data analysis does not alter the evidence itself. Examiners also use hash values to weed out files that are of no interest in the investigation, such as operating system files, and to identify files of particular interest.
>
> It is clear that hashing has become an important fixture in forensic examinations.

Richard P. Salgado, Fourth Amendment Search and the Power of the Hash, 119 Harvard Law Review Forum 38, 38 (2006).[3]

Overall, courts and judges – who are usually not conversant with the details of digital technology – seem to struggle a bit with reconciling prior cases which addressed searches of paper-and-ink documents or tangible objects such as drugs and weapons with the most recent methods of digital transmission of documents and the highly specialized methods which law enforcement uses to conduct investigations of this sort, but this type of internet investigation has been addressed in some cases:

> Here, the magistrate found that the application and affidavit: (1) described a method of communication known as peer-to-peer (P2P) computer file sharing using the worldwide Internet; (2) described how individuals wishing to share child pornography use the P2P method to share and trade digital files containing images of child pornography; (3) described Agent Morral's experience and training in computer usage and investigation of child pornography cases; (4) incorporated details of an investigation by Agent Cecchini who accessed a P2P file designated LimeWire and conducted a search looking for users accessing known child pornography sites;

3. As of 23 August 2016, available at http://federalevidence.com/pdf/2013/02Feb/EE-4thAmSearch-Power%20of%20Hash.pdf.

> (5) stated that an IP address traced to Stults was identified as accessing child pornography sites; and (6) recounted that shared files from Stults's computer were downloaded and reviewed and were identified as containing numerous images of child pornography.

U.S. v. Stults, 575 F.3d 834, 843–44 (8th Cir. 2009) (citation and quotation marks); *see*, *e.g.*, *U.S. v. Pavulak*, 700 F.3d 651, 660-65 (3rd Cir. 2012) (determining the affidavit was insufficient to establish probable cause, but good faith applied); *U.S. v. Miknevich*, 638 F.3d 178, 183 (3rd Cir. 2011) ("Thus, our review of the affidavit leaves a clear impression: the state magistrate was presented with an affidavit that provided no factual details regarding the substance of the images in question. Although either the actual production of the images, or a sufficiently detailed description of them, satisfies the Fourth Amendment's probable cause requirement, an insufficiently detailed or conclusory description cannot. We believe, however, that even given the infirmities we highlighted, the affidavit still contained information sufficient to permit a finding of probable cause by the magistrate." (citation omitted)). For example, in *U.S. v. Henderson*, a similar investigation and affidavit led to the seizure of child pornography on the defendant's computer, and he raised the same arguments in challenging the basis for issuance of the search warrant as defendant here. *See* 595 F.3d 1198, 1200 (10th Cir. 2010). The 10th Circuit Court of Appeals noted that the affidavit described Special Agent Robert Leazenby's

> professional background; describes the general protocol investigating officers use to identify distributors of child pornography, including how officers usually determine that a computer at a given IP address has transferred a video with a particular SHA value; and states that Leazenby "learned" that a computer with the relevant IP address had shared videos with child-pornography-related SHA values. His affidavit, however, does not identify: (1) who informed Leazenby that a computer with the relevant IP address had transferred child pornography; or (2) the method used in this case to establish that a computer at the specified IP address transferred videos with child-pornography-associated SHA values.

Id. at 1199-1200 (footnote omitted). In *Henderson*, the Court ultimately based its ruling upon the good faith exception, since "[t]he government wisely conceded at oral argument that Leazenby's affidavit is insufficient to establish probable cause. Notably, the affidavit fails to identify how Leazenby's source determined that a computer with the relevant IP

address—rather than some other computer—shared videos with child-pornography-related SHA values." *Id.* at 1201-02.

But here, the affidavit does identify how Detective Perez determined that the "computer with the relevant IP address[,]" *id.*, shared the child pornography: "Detective Perez was able to establish a direct connection to the computer located at IP address 174.96.87.196. During this connection Detective Perez determined that the computer at IP address 174.96.87.196 was utilizing a peer to peer file sharing program identified as 'Limewire' to access and share the files[.]" The affidavit also stated how Detective Perez had obtained information that "a computer with the relevant IP address had transferred child pornography[,]" *id.*, by describing his use of Operation Peer Precision and the Gnutella network. Here, the search warrant application and affidavit included sufficient information to permit the magistrate to make a neutral and independent determination of probable cause for the issuance of a warrant; we determine that the trial court erred in concluding otherwise.

The trial court also concluded that "[t]he 'good faith' exception applies in this case and therefore the evidence will not be suppressed." Defendant argues that the trial court erred in finding the good faith exception applicable, but we need not address this argument since we have determined that the trial court erred in its conclusion that the affidavit was not sufficient to support a determination of probable cause. While the trial court's reliance on good faith was misplaced, it ultimately came to the correct determination in denying defendant's motion to suppress, and therefore, we affirm the order. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). This argument is overruled.

III. Conclusion

Because we have determined probable cause was established in the search warrant application and affidavit, we need not address defendant's argument regarding good faith. Although the trial court erred in relying upon good faith as the basis for denial of defendant's motion to suppress, since the affidavit was sufficient to support the magistrate's determination of probable cause for issuance of the search warrant, we affirm.

AFFIRMED.

Judges ELMORE and DIETZ concur.

STATE v. LINDSEY

[249 N.C. App. 516 (2016)]

STATE OF NORTH CAROLINA
v.
ERIC LAMAR LINDSEY

No. COA15-1188

Filed 20 September 2016

1. Motor Vehicles—DWI—probable cause—other cases

The trial court did not err in a DWI prosecution by denying defendant's motion to suppress and dismiss where the evidence and the findings supported the conclusion that the officer had probable cause to arrest defendant for DWI. Simply because the facts in this case did not rise to the level of the facts in the cases distinguished by defendant did not mean that the trial court's findings were insufficient to support a probable cause determination.

2. Motor Vehicles—DWI—sufficiency of evidence

The trial judge did not err by denying defendant's motions to dismiss a DWI charge for insufficient evidence. There may have been more evidence of impairment in the cases cited by defendant, but this case must be judged on its facts, which provide more evidence of impairment that the case cited by defendant in comparison.

3. Trials—last jury argument—video played during cross-examination—substantive evidence

The trial court did not err in a DWI prosecution by determining that defendant had put on evidence and denying defendant the final argument to the jury where defendant did not call any witnesses or put on evidence after the conclusion of the State's case, but cross-examined the State's only witness (the officer who stopped defendant) and played a video of the entire stop recorded by the officer's in-car camera. The video went beyond the testimony of the officer and was not merely illustrative. Moreover, it allowed the jury to form its own opinion of defendant's impairment.

Appeal by defendant from judgments entered 14 April 2015 by Judge Martin B. McGee in Union County Superior Court. Heard in the Court of Appeals 29 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Sharon L. Smith for defendant.

McCULLOUGH, Judge.

Eric Lamar Lindsey ("defendant") appeals from judgments entered upon his convictions for habitual driving while impaired and driving while license revoked for impaired driving. For the following reasons, we find no error.

I. Background

On 27 May 2014, a Union County Grand Jury indicted defendant on charges of DWI, habitual DWI, and DWLR. The underlying DWI was later dismissed as the State chose to proceed on the more serious habitual DWI charge.

Prior to the case coming on for trial, defendant filed a motion to suppress evidence and dismiss with a supporting affidavit on 20 January 2015. Defendant's motion came on for hearing in Union County Superior Court before the Honorable W. David Lee on 21 January 2015. Although defendant's motion sought to suppress evidence of the stop, his statements, and his arrest, defendant indicated at the hearing that he was only focusing on the probable cause to arrest. On 26 January 2015, the trial court filed an order denying defendant's motion to suppress.

Defendant's case was then called for jury trial on 13 April 2015 in Union County Superior Court before the Honorable Martin McGee. The State's only witness was Officer Timothy Sykes, who pulled defendant over and arrested defendant in the early morning hours of 21 February 2014. Officer Sykes' testimony tended to show that at approximately 2:47 in the morning on 21 February 2014, he pulled behind defendant at a stoplight. Officer Sykes then ran the tag on defendant's vehicle and determined it was expired. Officer Sykes initiated a traffic stop at that time. Defendant made two turns and parked in a handicap spot in a McDonald's parking lot. Officer Sykes did not notice any driving mistakes. Once Officer Sykes approached the vehicle, defendant informed the officer that his license was suspended for DWI and provided the officer with an identification card. Officer Sykes noticed a medium odor of alcohol coming from defendant's breath and that defendant's eyes were red and glassy. Officer Sykes then returned to his patrol car, ran defendant's information, and confirmed that defendant's license was suspended for DWI. Once backup arrived, Officer Sykes returned to defendant's vehicle and asked defendant to exit the vehicle in order to perform field sobriety tests. Defendant complied and exited his vehicle without any problem. Officer Sykes first performed a horizontal gaze nystagmus test and noted 5 out of 6 indicators of impairment. Officer

Sykes then made multiple attempts to conduct a portable breath test but defendant did not provide an adequate breath sample to register on the device. Upon further questioning, defendant informed Officer Sykes that he had consumed three beers at approximately 6:00 the evening before. Based on his observations of defendant, Officer Sykes formed the opinion that defendant had consumed a sufficient quantity of alcohol so as to appreciably impair both his mental and physical faculties and placed defendant under arrest. Defendant later refused a breath test at the police station. Officer Sykes further testified that he was with defendant for approximately two hours and his opinion that defendant was appreciably impaired did not change.

During the State's evidence, and out of the presence of the jury, defendant stipulated to prior DWI convictions, at least in part to keep evidence of the prior convictions from being mentioned in front of the jury. Defendant also stipulated that his license was revoked for a DWI and pled guilty to DWLR as part of a plea arrangement. The trial judge accepted the plea, leaving only the habitual DWI charge for the jury. Upon further discussions, it was agreed that the case would proceed as a normal DWI case, since defendant had already stipulated to prior DWI convictions supporting the habitual portion of the habitual DWI charge.

At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss. The trial judge denied those motions.

On 14 April 2015, the jury returned a verdict finding defendant guilty of DWI. Upon the guilty verdict, the trial judge entered judgment sentencing defendant to a term of 25 to 39 months for habitual DWI. The trial judge also entered judgment imposing a consecutive two day sentence for DWLR for impaired driving. Defendant gave notice of appeal orally in court.

II. Discussion

Defendant now raises the following three issues on appeal: whether the trial court (1) erred in denying his motion to suppress; (2) erred in denying his motions to dismiss; and (3) erred in denying him the final argument to the jury.

1. Motion to Suppress

[1] Defendant first argues the trial court erred in denying his motion to suppress and dismiss because the totality of the circumstances in this case were insufficient to constitute probable cause to arrest him for DWI.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Our Courts have long recognized that

> [a]n arrest is constitutionally valid when the officers have probable cause to make it. Whether probable cause exists depends upon "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

State v. Streeter, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (quoting *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)); *see also State v. Eubanks*, 283 N.C. 556, 559-60, 196 S.E.2d 706, 708 (1973). This Court has further explained that:

> "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (citation omitted). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003).

State v. Teate, 180 N.C. App. 601, 606-607, 638 S.E.2d 29, 33 (2006).

The trial court's order in this case contained the following findings of fact:

> 1. On February 21, 2014, at approximately 2:53 a.m. Patrol Officer Timothy Sykes ("Officer Sykes") . . .

observed another vehicle as it proceeded ahead of him on the highway. Officer Sykes ran the tag on the vehicle and determined that the tag had expired.

2. Officer Sykes then activated his blue lights and followed the defendant, who properly signaled both right and left turns before entering a McDonald's parking lot where he parked well within the lines of a space marked for handicapped. Officer Sykes approached the vehicle and observed the defendant to be the driver and sole occupant of the Ford Taurus vehicle he was operating. Upon Officer Sykes's request the defendant produced only an identification card, admitting to the officer that his license was suspended. Officer Sykes smelled a moderate odor of alcohol coming from the defendant. He also observed the defendant's eyes to be red and glassy.

3. Officer Sykes, trained in the administration of the horizontal gaze nystagmus ("HGN"), administered the HGN test to the defendant, telling the defendant not to move his head and to follow the officer's finger with his eyes only. Of the six clues, or indicators of impairment about which Officer Sykes was trained and knowledgeable, he observed five such indications of impairment upon administering the test to the defendant.

4. Officer Sykes then directed the defendant to blow into a properly tested, calibrated and approved alco-sensor device. The defendant failed on at least three successive occasions to provide a sufficient sample of breath to enable a reading on the alco-sensor. Officer Sykes treated these failures as a refusal to submit to the alco-sensor.

5. The defendant admitted to Officer Sykes that he had consumed three Milwaukee Lite beers, but informed the officer that he had last consumed around 6:00 p.m. that afternoon, approximately 9 hours before the stop.

6. Following these events, Officer Sykes arrested the defendant for driving while impaired.

Based on these findings, the trial court concluded as follows:

2. Under the totality of the circumstances, and after carefully examining the attenuating facts and circumstances, including the officer's observations prior to arrest, the officer's administration of the HGN test, the defendant's responses to the officer's investigatory questions, and the refusal of the defendant to submit to the alco-sensor, the Court concludes that the facts and circumstances justified the officer's determination that reasonable grounds existed for believing that the defendant had committed an implied-consent offense.

3. Under the totality of the circumstances Officer Sykes possessed sufficient reliable and lawfully-obtained information at the time of the defendant's arrest to constitute a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the defendant was guilty of driving while impaired. The arrest and seizure of the defendant, as well as the evidence gathered by Officer Sykes was justified under the law.

4. The stop of the defendant's vehicle was based upon a reasonable articulable suspicion . . . and the subsequent arrest of the defendant did not violate the defendant's rights under the Fourth Amendment of the United States Constitution, Article I, Section 20 of the North Carolina Constitution, or the provisions of Chapter 15A of the North Carolina General Statutes.

Although defendant seems to take issue with the trial court's failure to issue findings of fact regarding police lights flashing during the HGN test, or the effect the flashing police lights may have had on the HGN test, defendant does not challenge any particular finding of fact issued by the trial court. Instead, defendant challenges the trial court's determination that its findings of fact support the conclusion that there was probable cause to arrest defendant for DWI. In doing so, defendant emphasizes that the trial judge thought this was "a really close case." Defendant then distinguishes the present case from cases in which this Court has upheld trial courts' probable cause determinations by identifying circumstances in those cases that were not present in this case; namely, that defendant was not driving poorly, did not commit a traffic violation, was not involved in an accident, did not have slurred speech, had no problem exiting the vehicle, was steady on his

feet, was cooperative and able to follow directions, and there was not an open container of alcohol visible in the vehicle. *See Teate*, 180 N.C. App. at 604-606, 638 S.E.2d at 32-33 (probable cause to arrest for DWI where the defendant failed to stop at a license checkpoint, there was an odor of alcohol on the defendant, the defendant admitted she had been drinking, the defendant's eyes were "glassy" and she had slurred speech, the defendant had difficulty performing counting tests, and breath samples tested with an alco-sensor instrument indicated intoxication); *Richardson v. Hiatt*, 95 N.C. App. 196, 200, 381 S.E.2d 866, 868 (1989) (probable cause to arrest for impaired driving where there was a strong odor of alcohol on the defendant, the defendant had been involved in a one-vehicle accident in excellent driving conditions in the middle of the afternoon, and the defendant claimed to have fallen asleep); *State v. Simmons*, 205 N.C. App. 509, 525-26, 698 S.E.2d 95, 106-107 (2010) (the defendant was driving poorly, there was a strong odor of alcohol coming from the defendant's breath, the defendant admitted he had consumed a couple of beers, there were beer bottles in the passenger area of the vehicle, one of which was half full, the defendant's eyes were red and glassy, the defendant's speech was slightly slurred, and alco-sensor tests of the defendant's breath were positive for alcohol; but probable cause to arrest was upheld solely based on the defendant's possession of an open container of alcohol in the vehicle). Thus, defendant contends the evidence of impairment in the present case does not rise to the level of the evidence in other cases. Defendant analogizes the facts in the present case to the facts in *State v. Sewell*, __ N.C. App. __, 768 S.E.2d 650 (*available* at 2015 WL 67193), *disc. rev. denied*, 368 N.C. 239, 768 S.E.2d 851 (2015), in which this Court affirmed the trial court's determination that there was not probable cause to arrest the defendant for DWI. Defendant contends that there was more evidence of impairment in *Sewell* then in the present case and, yet, there still was not probable cause to arrest for DWI in *Sewell*.

We are not persuaded by defendant's arguments. Simply because the facts in this case do not rise to the level of the facts in the cases distinguished by defendant does not mean the trial court's findings in this case are insufficient to support a probable cause determination. "Whether probable cause exists to justify an arrest depends on the 'totality of the circumstances' present in each case." *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). The evidence in this case supports the following findings by the trial court: the officer smelled a moderate odor of alcohol coming from defendant and observed defendant's eyes to be red and glassy; the officer observed five of six indicators of impairment upon administering

an HGN test to defendant; and defendant admitted to the officer that he had consumed three beers hours before the stop. Without even considering defendant's multiple failed attempts to provide an adequate breath sample on an alco-sensor device, we hold the trial court's findings support its conclusion that there was probable cause to arrest defendant for DWI.

Additionally, we note that *Sewell* is not controlling in the present case. First and foremost, *Sewell* is an unpublished opinion and does not constitute controlling legal authority. *See* N.C. R. App. P. 30(e)(3) (2016). Second, although some facts are similar, there are key distinctions between the facts in *Sewell* and the present case. In *Sewell*, the defendant was stopped at a checkpoint and a trooper detected a strong odor of alcohol "emanating from [the] defendant's vehicle, not from the defendant, who was accompanied by a passenger." 2015 WL 67193 at *3. The trooper also observed that the defendant had red and glassy eyes, the defendant exhibited six of six indicators on the HGN test, and the defendant tested positive for the presence of alcohol on two alco-sensor breath tests. The trial court, however, determined the facts and circumstances known to the trooper were insufficient to establish probable cause to believe the defendant had committed the offense of DWI where the trooper "did not testify that [the] defendant herself was the source of the odor of alcohol[]" and the defendant did not have slurred speech, retrieved her license and registration without difficulty or delay, was steady on her feet, was cooperative, and exhibited no signs of intoxication on the "[o]ne-[l]eg [s]tand" and "[w]alk and [t]urn" tests. *Id.* This court affirmed the grant of the defendant's motion to suppress. *Id.* Contrary to the facts in *Sewell*, the evidence in this case was that defendant was the sole occupant of the vehicle and the officer smelled a medium odor of alcohol coming from defendant's breath. We find this factual discrepancy to be significant.

It is the trial judge's role to weigh the credibility of the witnesses and the evidence. Here, the evidence supports the trial court's findings, which in turn support the conclusion that the officer had probable cause to arrest defendant for DWI.

2. Motion to Dismiss

[2] Defendant also argues the trial judge erred in denying his motions to dismiss the DWI charge for insufficiency of the evidence.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court

is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotation marks omitted).

Relevant to this case, the offense of impaired driving is defined as follows: "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C. Gen. Stat. § 20-138.1(a)(1) (2015). Thus, "[t]he essential elements of DWI: are (1) [d]efendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). The only element at issue in this case is the third element, the impairment of defendant.

This Court has explained that "[b]efore [a] defendant can be convicted under N.C. Gen. Stat. § 20-138.1(a)(1), the State must prove

beyond a reasonable doubt that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired. This means a finding that defendant's impairment could be recognized and estimated." *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997) (internal citation omitted). In *Phillips*, this Court held that there was sufficient evidence the defendant was appreciably impaired to satisfy the elements of N.C. Gen. Stat. § 20-138.1(a)(1) when reviewing the record in the light most favorable to the State where there was evidence of erratic driving, a pronounced odor of alcohol on the defendant, and the defendant admitted to drinking significantly earlier in the evening. *Id.* at 393, 489 S.E.2d at 892.

Similar to his argument concerning the denial of his motion to suppress, defendant contends the evidence of intoxication in this case is distinguishable from evidence in prior cases in which our courts determined there was sufficient evidence of impairment to survive motions to dismiss. *See id.*; *State v. Norton*, 213 N.C. App. 75, 79-80, 712 S.E.2d 387, 390-91 (2011) (sufficient evidence of impairment where there were witnesses to erratic driving, the defendant exhibited superhuman strength when officers attempted to apprehend him, a witness smelled alcohol on the defendant, and blood tests established the defendant's alcohol and cocaine use); *State v. Scott*, 356 N.C. 591, 597-98, 573 S.E.2d 866, 869-70 (2002) (sufficient evidence of impairment where there was a strong odor of alcohol in the defendant's vehicle, the officer observed an open container of beer in the passenger area of the vehicle, the defendant's coat was wet from what appeared to be beer, and the defendant's speech was slurred). Defendant emphasizes that in those cases, "the defendant was involved in an accident, there was evidence of faulty driving or erratic behavior, alcohol was found in the car, and/or there was substantial evidence that the defendant was over the legal limit for alcohol[,]" facts which are not present in this case. Defendant instead compares his case to *State v. Hough*, 229 N.C. 532, 50 S.E.2d 496 (1948), in which the Court held there was insufficient evidence of impairment to raise more than a suspicion or conjecture of impairment where the only evidence was from two officers who arrived at the scene of an accident approximately 25 minutes after the accident, one of whom testified that he opined the defendant driver was intoxicated based on the fact that he smelled something on the defendant's breath, and the other who testified he was of the opinion the defendant was intoxicated or under the influence of something. *Id.* at 533-34, 50 S.E.2d at 496-97. But in *Hough*, both officers testified that they were unsure whether the defendant's condition that night was the result of impairment or the accident. *Id.* at 533, 50 S.E.2d at 497. The Court reasoned that "[i]f the witnesses who observed the

defendant immediately after his accident, were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of the injuries he had just sustained, we do not see how the jury could do so." *Id.*

As in the first issue on appeal, we agree that there may have been more evidence of impairment in the cases cited by defendant. Yet, we must judge the facts of the present case, which provide more evidence of impairment than in *Hough*.

Here the evidence was that defendant pulled into a handicap spot, Officer Sykes noticed a moderate odor of alcohol coming from defendant's breath, defendant had red and glassy eyes, defendant admitted to consuming alcohol hours before, Officer Sykes noted five out of six indicators of impairment on the HGN test, and Officer Sykes believed that defendant was impaired. Viewing these facts in the light most favorable to the State, and despite other evidence tending to show defendant was driving properly and was steady on his feet, we hold the evidence in this case was sufficient to survive defendant's motions to dismiss.

3. Final Argument to the Jury

[3] In defendant's final argument on appeal, defendant contends the trial court erred in denying him the final closing argument to the jury.

Pertinent to this issue, Rule 10 of the North Carolina General Rules of Practice for the Superior and District Courts provides that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." N.C. Super. and Dist. Ct. R. 10 (2016).

In this case, defendant did not call any witnesses or put on any evidence after the State concluded its presentation of the case. Yet, defendant did cross-examine the State's only witness and sought to play a video of the entire stop recorded by the officer's in-car camera during cross-examination. Defendant argued the video was illustrative. The State argued playing the video constituted introducing evidence. After argument on the issue, the trial court noted that it was a "difficult call" and indicated to the parties that it would make its final determination of whether the video constituted new evidence after the video had been played. The parties agreed, with the defense further indicating that "[they] intend to play [the video] one way or the other and understand the potential consequences." The video was marked as "Defendant's Exhibit 1" and played for the jury, with defendant stopping the video at times to ask questions of the State's witness. Upon the conclusion of the

defense's cross-examination and the close of the State's evidence, the trial court heard further arguments by the parties on whether the video constituted new evidence. The trial court again noted it was a "tough call," but ultimately determined that playing the video to the jury constituted putting on evidence, resulting in defendant's loss of the final argument to the jury.

The question we must address is whether admitting the entire video of the stop during cross-examination constituted introducing evidence. In *State v. Hennis*, 184 N.C. App. 536, 646 S.E.2d 398, *disc. rev. denied*, 361 N.C. 699, 653 S.E.2d 148 (2007), this Court summarized the applicable law as follows:

> In *State v. Shuler*, 135 N.C. App. 449, 520 S.E.2d 585 (1999), this Court determined that evidence is "introduced," within the meaning of Rule 10, when the cross-examiner either formally offers the material into evidence, or when the cross-examiner presents new matter to the jury that is not relevant to the case. *Id.* at 453, 520 S.E.2d at 588; *see also State v. Wells*, 171 N.C. App. 136, 138, 613 S.E.2d 705, 706 (2005) (quoting *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588). However, "[n]ew matters raised during the cross-examination, which are relevant, do not constitute the 'introduction' of evidence within the meaning of Rule 10." *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588. Most recently, in *State v. Bell*, 179 N.C. App. 430, 633 S.E.2d 712 (2006), this Court stated that evidence is introduced during cross-examination when: "(1) it is 'offered' into evidence by the cross-examiner; or (2) the cross-examination introduces new matter that is not relevant to any issue in the case." *Id.* at 431, 633 S.E.2d at 713 (citing *Shuler*, 135 N.C. App. at 452-53, 520 S.E.2d at 588).

Id. at 537-38, 646 S.E.2d at 399. In *Hennis*, this Court addressed "whether, under the first test in *Bell*, the defendant 'offered' [a] diagram and incident report into evidence during his cross-examination." *Id.* at 538, 646 S.E.2d at 399. This Court further explained that "[i]n *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982), this Court set forth the following test to determine whether evidence is 'offered' within the meaning of Rule 10: 'whether a party has offered [an object] as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness.' " *Hennis*, 184 N.C. App at 538, 646 S.E.2d at 399 (quoting *Hall*, 57 N.C. App. at 564, 291 S.E.2d at 814). Applying the above law, this Court granted the *Hennis*

defendant a new trial, holding the defendant did not offer evidence under either test articulated in *Bell*. *Id.* at 539, 646 S.E.2d at 400. This Court reasoned that the exhibits in *Hennis* related directly to the State's witness' testimony on direct examination and did not constitute substantive evidence – the diagram was used to merely illustrate the State's witness' prior testimony and the incident report was not published to the jury as substantive evidence, nor given to the jury to examine. *Id.*

In the present case, defendant now analogizes the facts of his case to *Hennis* and asserts "[t]he videotape was used by the defendant to illustrate Officer Sykes' account of these events. It was not admitted as substantive evidence and it was directly relevant to Officer Sykes' testimony[.]" We are not convinced.

Although Officer Sykes had provided testimony describing the stop that was shown in the video, we agree with the trial court that the video evidence in this case goes beyond the testimony of the officer, and is different in nature from evidence presented in other cases that was determined not to be substantive. Here, the playing of the video of the stop allowed the jury to hear exculpatory statements by defendant to police beyond those testified to by the officer and introduced evidence of flashing police lights, that was not otherwise in the evidence, to attack the reliability of the HGN test. This evidence was not merely illustrative. Moreover, the video allowed the jury to make its own determinations concerning defendant's impairment apart from the testimony of the officer and, therefore, amounted to substantive evidence. Consequently, we hold the trial court did not err in determining defendant put on evidence and in denying defendant the final argument to the jury.

III. Conclusion

For the reasons discussed above, we find the trial court did not err in denying defendant's motions to suppress or dismiss, or in denying defendant the final closing argument to the jury.

NO ERROR.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
CLAIRY KANYINDA MBAYA

No. COA16-364

Filed 20 September 2016

1. Evidence—rape victim—past sexual activity—irrelevant

The trial court correctly excluded as irrelevant under the Rape Shield Statute evidence of a teen-aged rape victim's past sexual activity where her past activity and parental punishments were not tied in any substantive manner to this incident or to a motive for her to fabricate these allegations. Moreover, even if relevant, this evidence would have been more prejudicial than probative.

2. Constitutional Law—right to present complete defense—Rape Shield Statute

The trial court did not violate defendant's constitutional right to present a complete defense in a prosecution for rape and other offenses by preventing defendant from cross-examining witnesses about irrelevant information. The information excluded was irrelevant under the Rape Shield Statute.

Appeal by defendant from judgment entered 20 August 2015 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

TYSON, Judge.

Clairy Kanyinda Mbaya ("Defendant") appeals from judgment entered after a jury convicted him of statutory rape, statutory sex offense, and taking indecent liberties with a child. We find no error.

I. Factual Background

In February 2014, A.B. was living with her mother, her two younger siblings, and Defendant. Defendant was A.B.'s mother's boyfriend and

had been living in the apartment since 2013. A.B. was fifteen years old at the time the incidents occurred.

On the afternoon of 21 February 2014, A.B. returned home after school, ate, and went to sleep in her room. No one else was home because A.B.'s mother was pregnant and having contractions. Defendant, who was the newly arriving baby's father, drove A.B.'s mother to the hospital around 3 p.m. that afternoon. Defendant drove the work vehicle assigned to him by his employer, a chauffeured vehicle transportation company.

A.B.'s mother had arranged for A.B.'s two younger siblings to stay with other relatives, and for A.B. to stay with A.B.'s father while she was in the hospital. A.B.'s father planned to pick A.B. up after he left work that day.

A.B. testified at trial she woke up at approximately 8:10 p.m. and heard her bedroom door open and close. A few minutes later, she heard her door open again and saw a man walk into the room. A.B. testified the man was dressed in black, wore a mask that covered facial features, except his eyes, his nose, and dreadlocks, and that he carried a gun. A.B. did not recognize the man at first.

A.B. testified that the man said he would not hurt her, but told her to remove her clothes. He performed oral sex on her and told her to do the same to him. When A.B. refused, he had her rub his penis with her hands. Then, he pushed her on the bed, kissed the side of her face and neck, and raped her. Next, Defendant told her to get on "all fours" and raped her again. At that point, the man turned on the light and A.B. recognized him as Defendant. She recognized his eyes, nose, and dreadlocks and that he spoke with the same African accent as Defendant.

As these incidents occurred, A.B. cried and asked Defendant to stop and leave. Defendant did not stop until A.B.'s father knocked on the door to pick her up around 9:20 p.m. A.B. yelled for her father to hold on. Defendant made A.B. get onto her knees and told her that he was going to ejaculate on her face. Instead, he ejaculated on her chest. A.B. wiped herself off with a pair of sweatpants, dressed, and walked to the front door. Defendant followed her to the door and told her not to say anything or he would kill her.

A.B. left the apartment and walked over to her father, who was standing by his vehicle. A.B.'s father noticed that A.B. was upset and asked her what was wrong. A.B. replied she had just broken up with her boyfriend, because she was scared that Defendant would kill her or her father. A.B.'s father did not believe her and pressed the matter further. A.B. told her father she had just been raped.

A.B.'s father immediately returned to the apartment, but no one was there. They traveled to a nearby relative's house and called the police. An ambulance took A.B. to the hospital where she was examined, gave statements to officers and a nurse describing what happened, and evidence was collected with a rape kit.

Defendant was at the hospital when the baby was born, which was at approximately 12:00 a.m. on 22 February 2014. Shortly thereafter, Defendant was first questioned by detectives concerning his whereabouts at the time of the offenses. Defendant stated he stayed with A.B.'s mother at the hospital for several hours and left around 7:30 p.m. to pick up a friend at a hotel and go to Wal-Mart to buy paint. Detectives did not question Defendant further at the hospital, but arranged for him to come to the Law Enforcement Center the next day on Saturday, 22 February 2014.

On Saturday, Defendant dropped off his work vehicle at his employer's office. Although scheduled to work on Sunday, Defendant did not arrive for his shift. Defendant also failed to show up for his appointment at the Law Enforcement Center on Saturday. He was contacted by a detective and agreed to come in later that day but failed to appear. A detective called Defendant again, but he did not answer his cell phone or respond to the messages left by the detective.

While Defendant was missing, detectives learned that Defendant's employer had a Global Positioning System ("GPS") device installed on his work vehicle that tracked the location of the vehicle. The GPS records indicated the vehicle was not driven to a hotel or to a Wal-Mart after Defendant left the hospital on Friday 21 February 2014 and during the time the offenses occurred.

Rather, GPS records kept by Defendant's employer show the vehicle was driven away from the hospital around 7:30 p.m., arrived at Pitts Drive at 7:47 p.m., left Pitts Drive at 9:27 p.m., and returned to the hospital at 9:37 p.m. Pitts Drive is near A.B.'s mother's apartment and is the same street where the vehicle was located before Defendant drove A.B.'s to the hospital earlier that day. Arrest warrants were issued on 24 February 2014. Defendant was arrested on 5 March 2014. Prior to being arrested, Defendant cut off his dreadlocks.

Detectives interviewed Defendant on 28 May 2014 and the interview was recorded and transcribed. Defendant told detectives, again, after he left the hospital, he picked up his friend from a hotel and went to Wal-Mart. He then dropped off his friend at the hotel on Sugar Creek Road and returned to the hospital. Defendant said he did not go anywhere

else, he had driven his work vehicle, and that no one else drove it that day.

At this point in the questioning, detectives informed Defendant that the GPS tracking records for his work vehicle conflicted with his account of his whereabouts that night. Defendant admitted he returned to the apartment to get food, shoes, and to check the places he was supposed to paint. Although A.B.'s mother had given Defendant her key to the apartment, Defendant said he had knocked on the apartment door before entering and nobody answered. Once inside, he stated that he knocked on the inside doors that were not open and nobody was there. Later on in the interview, he admitted that when he opened A.B.'s bedroom door and looked in, he saw her asleep inside. He said he closed the door and never went back.

Forensic experts at the Charlotte-Mecklenburg Police Department's crime laboratory examined swabs and smears collected from A.B. at the hospital and a buccal swab taken from Defendant after his arrest. Sperm fractions were produced from the swabs and specimens taken from A.B.'s vagina, anus, external genitalia, and chest. Tests on the swabs from A.B.'s anus, external genitalia, and chest showed the presence of DNA matching Defendant's DNA profile. DNA found on the swab taken from A.B.'s neck also matched Defendant's DNA profile.

A. Pre-Trial Hearing

On 17 August 2015, at the beginning of the trial, the State filed a motion to enforce Rule 412, the Rape Shield Statute, to prevent Defendant from presenting any irrelevant evidence of A.B.'s other sexual activity. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2015). The State sought an order for Defendant and his counsel to "refrain from eliciting, proffering, or attempting to elicit or proffer any testimony or evidence regarding the sexual behavior of the minor child, from her or any other witness that testifies." The trial court cleared the courtroom to hear each party's arguments on the State's motion and the evidence Defendant intended to introduce regarding A.B's sexual history in response to the motion.

Defendant's counsel stated Defendant would present alibi evidence, and wanted to show A.B. was sexually active as evidence of the guilt of another perpetrator. He planned to elicit this testimony from A.B., her mother, and her father. The prosecutor informed the court that information obtained in discovery indicated A.B. was a sexually active teenager, and that she had last engaged in sex in December, a couple of months prior to the rape and sexual offenses on 21 February 2014.

Defendant's counsel argued in reply that for the court to allow the State's Rule 412 motion to exclude evidence would be unconstitutional and deny him the opportunity to present a complete defense. He asserted Defendant would be prevented from "presenting the evidence that others could have committed this crime." Counsel conceded the evidence only showed A.B. last had sexual intercourse in December prior to the February incidents, but asserted "a jury might infer that that was not an honest statement." Defendant's counsel noted "[A.B.'s] credibility is a key factor" in this case as she was "the only person who was at home at the time and has made the allegation of the conduct."

Notwithstanding Defendant's argument, the only evidence Defendant sought to introduce at that time was that A.B. had previously been sexually active. He did not offer any proposed evidence linking the sexual conduct to another possible perpetrator, or any other issue in the case, as is shown in the following exchange with the trial judge:

> THE COURT: I'm not sure, other than the fact that she was purportedly sexually active, what you're seeking to introduce.
>
> MR. LOVEN: Nothing your honor.
>
> THE COURT: Just that she was sexually active?
>
> MR. LOVEN: Yes, Your Honor.

The trial court granted the State's Rule 412 motion and excluded the evidence. The trial court also found, "aside from the Rule 412 analysis, . . . additionally the dangers of prejudice arising from testimony regarding a teenager being sexually active far outweigh any probative value." *See* N.C. Gen. Stat. § 8C-1, Rule 403.

B. *Voir Dire* of Complainant

Following A.B.'s testimony, Defendant obtained information in a *voir dire* hearing indicating that A.B. had been sexually active prior to the date of the alleged rape and sex offenses, but she had not engaged in sexual intercourse since December and the sexual activity in December was consensual. Although her parents were not aware of the sexual activity in December, they were aware that she had been sexually active in the past.

When questioned about her parents' reaction to learning she was sexually active, A.B. stated she had been punished, but not seriously. Rather, "it was more of something that [she] just had to think about and

realize the choices that [she] made rather than [her] parents actually punishing [her]." A.B. testified she was not concerned about consequences she would receive for such conduct or for telling her parents about future sexual conduct.

At the conclusion of the cross-examination, Defendant moved that evidence of A.B.'s past sexual activity and parental punishment be allowed for the purpose of showing she possessed a motive to fabricate the charges against Defendant. The State argued such evidence was irrelevant under Rule 412 and was not admissible for a proper reason.

In addition, the State argued evidence tending to show a teenager had engaged in sexual activity, and her parents were unhappy with her, does not show she would fabricate allegations of rape and sexual assaults. After considering the testimony, the trial court stated, "[m]y ruling with regard to the motion will remain that the defense is prohibited, pursuant to 412, from questioning the victim concerning prior sexual activity."

C. *Voir Dire* of Complainant's Parents

Following the testimony of A.B.'s father, Defendant questioned him about A.B.'s sexual activity in a *voir dire* hearing. A.B.'s father testified that he was aware that she had been sexually active and had a boyfriend. A.B.'s father discussed the risks of sexual activity with A.B., but he did not recall imposing any particular punishment. He stated he probably told her he "would deny her some privileges if she kept doing it."

A.B.'s mother testified during *voir dire* cross-examination that she first learned A.B. was sexually active several years before the alleged rape occurred. Like A.B.'s father, A.B.'s mother testified she had talked about the implications of having sexual intercourse and had previously punished A.B. by taking away her cell phone. A.B.'s mother believed A.B. was still sexually active, but was not surprised because, as she testified, "I was young once before, and I know." A.B.'s mother also noted A.B. was not permitted to have her boyfriend at the house when an adult was not present.

Following each testimony, Defendant's counsel requested the testimony be presented to the jury to show that A.B. had motive and opportunity to lie about the rape and sexual offenses. Both times, the trial court indicated its previous Rule 412 ruling would not change and denied Defendant's request to admit the evidence.

The jury convicted Defendant of statutory rape, statutory sex offense, and taking indecent liberties with a child. The jury also found

Defendant had taken advantage of a position of trust and confidence at the time of the crime as an aggravating factor.

Defendant was sentenced to a minimum of 300 months and a maximum of 420 months for the statutory rape conviction. The indecent liberties and statutory sex offense convictions were consolidated and Defendant was sentenced to a consecutive term of imprisonment for a minimum of 300 months and a maximum of 420 months. Defendant was also ordered to register as a sex offender for life and enroll in lifetime satellite based monitoring upon release. Defendant appeals.

II. Issues

Defendant argues the trial court erred by ruling North Carolina Rule of Evidence 412 barred him from presenting evidence during cross-examination of A.B.'s past sexual activity, which resulted in punishment by her parents. Defendant argues: (1) the evidence was relevant to show A.B. had a motive to fabricate a claim of being raped, and (2) the exclusion of the evidence violated his constitutional right to present a complete defense.

III. Standard of Review

The Rape Shield Statute is "a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims. The exceptions . . . merely define those times when the prior sexual behavior of the complainant is relevant to issues raised in a rape trial." *State v. Khouri*, 214 N.C. App. 389, 405-06, 716 S.E.2d 1, 12 (2011) (quoting *State v. Baron*, 58 N.C. App. 150, 153, 292 S.E.2d 741, 743 (1982) (internal quotation marks and citations omitted)), *disc. review denied*, 365 N.C. 546, 742 S.E.2d 176 (2012); *see* N.C. Gen. Stat. § 8C-1, Rule 412.

"A trial court's ruling on relevant evidence is not discretionary and therefore is not reviewed under the abuse of discretion standard." *State v. Moctezuma*, 141 N.C. App. 90, 94, 539 S.E.2d 52, 55 (2000) (citations omitted).

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling

> on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

Khouri, 214 N.C. App. at 406, 716 S.E.2d at 12-13 (citation omitted).

This Court also held that "the same deferential standard of review should apply to the trial court's determination of admissibility under Rule 412." *Id.*

We review *de novo* a defendant's arguments that his constitutional rights were violated. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

IV. Analysis

A. Rape Shield Statute

[1] Defendant argues that the trial court erred in excluding A.B.'s past sexual activity. We disagree.

The Rape Shield Statute states that evidence regarding the sexual activity of the complainant, other than the sexual act at issue, "is irrelevant to any issue in the prosecution," unless it falls within one of four categories. N.C. Gen. Stat. § 8C-1, Rule 412(a) and (b). Prior to asking questions concerning a complainant's other sexual activity, the proponent must first make an offer of proof to allow the trial court to determine the admissibility of the evidence. N.C. Gen. Stat. § 8C-1, Rule 412. This proffer must occur at a transcribed *in camera* hearing before any mention of the complainant's other sexual activity is to be made in the presence of a jury. *Id.*

The purpose of the statute is "to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has *little relevance to the case and has a low probative value.*" *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982) (emphasis supplied).

Our Supreme Court noted the Rape Shield Statute: "define[s] those times when [other] sexual behavior of the complainant is relevant to issues raised in a rape trial and *[is] not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.*" *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (emphasis supplied). As such, the four exceptions in the Rape Shield Statute are not

"the sole gauge for determining whether evidence is admissible in rape cases." *Younger*, 306 N.C. at 698, 295 S.E.2d at 456.

This Court recently held "there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." *State v. Martin*, __ N.C. App. __, __, 774 S.E.2d 330, 336-37 (citing *State v. Edmonds*, 212 N.C. App. 575, 580, 713 S.E.2d 111, 116 (2011) (noting "[t]he lack of a specific basis under [the Rape Shield Statute] for admission of evidence does not end our analysis")), *disc. review denied*, __ N.C. __, 775 S.E.2d 844 (2015); *see e.g.*, *State v. Rorie*, __ N.C. App. __, __, 776 S.E.2d 338, 344 (2015) ("[E]vidence that [the victim] was discovered watching a pornographic video, without anything more, is not evidence of sexual activity barred by the Rape Shield Statute."), *disc. review denied*, __ N.C. __, 784 S.E.2d 482 (2016).

In *Martin*, the defendant, a high school substitute teacher, was accused of sexually assaulting a female student. *Id.* at __, 744 S.E.2d at 331. The female student testified the defendant walked into the boy's locker room, saw she was standing and talking with two football players, told the boys to leave, and then demanded that she perform oral sex on him. *Id.* at __, 774 S.E.2d at 331-32.

At trial, the defendant sought to introduce testimony from himself and two other witnesses to show the female student was *in flagrante delicto* performing oral sex upon the football players when the defendant entered the locker room. *Id.* at __, 774 S.E.2d at 332. The defendant argued evidence was necessary to show the student had a reason to fabricate her accusations against the defendant, and to cover up her true actions. *Id.*

This Court concluded if the State's evidence is "based largely on the credibility of the prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant" and "motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault." *Id.* at __, 744 S.E.2d at 336. Rather, in that case:

> [T]he trial court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show [complainant's] motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under

> Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). *See State v. Edmonds*, 212 N.C. App. at 578, 713 S.E.2d at 115 (quoting N.C. Gen. Stat. § 8C–1, Rule 403 (2009)).

Id.

Soon after our decision in *Martin*, this Court considered a similar case that it deemed to be "indistinguishable from *Martin* in any meaningful way." *State v. Goins*, __ N.C. App. __, __, 781 S.E.2d 45, 61 (2015). The Court held statements by complainant made to police that he was addicted to pornography, had an extramarital affair, and could not control his behavior because of what the defendant had done to him were relevant to show that complainant had a motive to fabricate allegations against the defendant. *Id.*

Like *Martin*, the charges in *Goins* were based largely upon the credibility of the complainant's testimony and the defendant sought to introduce evidence tending to show the complainant's motive to falsely accuse. *Id.* Also important to the Court was that the defendant "did not seek to cross-examine a prosecuting witness about his or her general sexual history. Instead, [d]efendant had identified specific pieces of evidence that could show [the complainant] had a reason to fabricate his allegations against [d]efendant." *Id.* (citations omitted). Upon review, this Court held that it was improper for the trial court to exclude the testimony under Rule 412 and Rule 401. *Id.* Defendant relies on this Court's decisions in *Martin* and *Goins* to support his argument.

The facts of this case are readily distinguishable from those cases. Defendant does not contend A.B.'s past sexual activity was admissible under one of the four categories in N.C. Gen. Stat. § 8C-1, Rule 412(b). Rather, he asserts A.B.'s past sexual activity and parental punishment for such activity is relevant to show that she had a motive to fabricate the accusations against Defendant.

Unlike *Martin*, Defendant proposed evidence about occurrences which were not close in time and proximity to the alleged crime. *See Martin*, __ N.C. App. at ___, 774 S.E.2d at 331-32; *see Edmonds*, 212 N.C. App. at 581-82, 713 S.E.2d 111, 117 (holding the trial court did not err by refusing to admit "some distant sexual encounter which has no relevance to this case other than showing that the witness [was] sexually active" (quoting *Younger*, 305 N.C. at 696, 295 S.E.2d at 456)). The sexual activity the defendant in *Martin* wished to present occurred on the same day and time as the sexual activity at issue in that case. Here, the evidence showed A.B. had not engaged in sexual activity for

several months prior to the actions at issue. A.B.'s parents also knew she had been sexually active for several years prior to the incidents. No evidence ties A.B.'s past sexual activity or parental punishment to the incident that occurred on 21 February 2014.

The court's analysis in both *Martin* and *Goins* indicated the State's case relied largely upon the testimony of the prosecuting witness, and both defendants had sought admission of evidence tending to show the witness had motive to falsely accuse. In both cases, this Court ruled this evidence could be relevant. *Id.* at ___, 774 S.E.2d at 336, *Goins*, __ N.C. App. at __, 781 S.E.2d at 61. Specifically in *Martin*, the Court noted that "[t]here were no other eyewitnesses or any physical evidence proving the crime had occurred." *Martin*, __ N.C. App. at __, 774 S.E.2d at 336.

A.B.'s allegations and testimony is supported by other compelling physical evidence submitted by the State. First, the evidence showed recovered samples collected from A.B.'s anus, chest, external genitalia, and neck in the rape kit contained material matching Defendant's DNA profile. Second, Defendant's employer's GPS records of the times and locations of the vehicle driven by Defendant, together with his denials and many false statements, showed that he drove and parked the vehicle near the apartment during the times the rape and sexual offenses occurred after he left the hospital. The vehicle remained at the apartment during the time the rape and sexual offenses occurred and left near the time A.B's father picked her up from the scene immediately following the attack. Third, Defendant gave conflicting accounts until confronted with GPS evidence from the vehicle he drove, failed to keep his appointment at the Law Enforcement Center the day after the incident and never returned detectives' calls, disappeared after he was first questioned by police, and altered his appearance by cutting off his dreadlocks before he was located and arrested.

Testimony presented during the *in camera* hearing supports the trial court's determination to block the victim's prior sexual activity as the type of irrelevant evidence the Rape Shield Statute was enacted to exclude. *See* N.C. Gen. Stat. § 8C-1, Rule 412. A.B.'s testimony indicated her parents were aware of her prior sexual activity and she was not concerned about being punished for engaging in sexual conduct. When asked whether she was seriously punished, she said: "No . . . it was more of something that I just had to think about and realize the choices that I made rather than my parents actually punishing me." Nothing in her parents' testimony indicated a reason to doubt A.B.'s statement to that point. At most, her parents indicated that as consequences, they had taken away some of her privileges and cell phone.

Defendant contends A.B.'s father's testimony supported an inference that A.B.'s father suspected A.B. might have been engaged in sexual activity with a boyfriend when he arrived to pick her up the night of the rape. No evidence shows A.B.'s boyfriend was present at the apartment or that someone else was engaged in sexual conduct with A.B. during the time the offenses occurred. A.B. testified Defendant turned on the lights and she recognized his eyes, nose, voice, and dreadlocks even with the mask over his face. Defendant admitted to police that when he went inside the apartment on the night of the rape, no one else was there other than A.B. and he observed she was asleep in her bed.

The trial court correctly excluded the evidence regarding A.B.'s past sexual activity. This evidence is precisely what the Rape Shield Statute was enacted to exclude: evidence with "little relevance to the case and [that] has a low probative value." *Younger*, 306 N.C. at 696, 295 S.E.2d at 456. A.B.'s past sexual activities and parental punishments were not tied in any substantive manner to the incidents which occurred on 21 February 2014 or to A.B.'s motive to fabricate these allegations. As the trial court also noted, even if relevant, this evidence would have been more prejudicial than probative. *See* N.C. Gen. Stat. § 8C-1, Rule 403.

B. Constitutional Right to Present a Complete Defense

[2] Defendant argues his constitutional right to present a complete defense was violated by the exclusion of the evidence showing A.B. had been punished for her previous sexual activity. We disagree.

The right of a defendant to cross-examine an adverse witness is a substantial right. *See Olden v. Kentucky*, 488 U.S. 227, 231-32, 102 L. Ed. 2d. 513, 519-20 (1988). As such, an unreasonable exclusion of relevant evidence about a witness's sexual behavior violates a defendant's ability to introduce evidence relevant to his defense. *Id.* at 232-33, 102 L. Ed. 2d. at 520-21. However, the Supreme Court of the United States has stated:

> "[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " *Rock v. Arkansas*, 483 U.S. 44, 55, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987), quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). We have explained, for example, that "trial judges retain wide latitude" to limit reasonably a criminal defendant's right to cross-examine a witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'

> safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986).

Michigan v. Lucas, 500 U.S. 145, 149, 114 L.E.2d 205, 212 (1991). In *Lucas*, the Supreme Court of the United States then held that the Michigan Rape Shield Statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id.* at 149-50, 114 L.E.2d at 212.

The Supreme Court of North Carolina has similarly concluded that "there is no constitutional right to ask a witness questions that are irrelevant." *Fortney*, 301 N.C. at 35, 269 S.E.2d at 112 (citations omitted). In *Fortney*, the Supreme Court considered a challenge to the Rape Shield Statute on Confrontation Clause grounds. *Id.* at 36, 269 S.E.2d at 112-13; *see* U.S. Const. Amend. 6. Even with North Carolina's wide-ranging policy of cross-examination, the Court held that "while a defendant may generally cross-examine to impugn the credibility of a witness, this right is not inviolate. Indeed . . . a court has a duty to protect a witness 'from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate . . . .' " *Id.* at 36, 269 S.E.2d at 113 (quoting *Alford v. United States*, 282 U.S. 687, 694, 75 L. Ed. 624, 629 (1931)).

The Court in *Fortney* considered the legislative and procedural purpose of the Rape Shield Statute and how the statute's exceptions "provide ample safeguards to insure that relevant evidence is not excluded." *Id.* at 41, 269 S.E.2d at 115. Concluding its analysis of the constitutional issue, the Court stated:

> All of [Rule 412's] exceptions define those times when the prior sexual behavior of a complainant *is* relevant to issues raised in a rape trial, and are not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.
>
> Nor does the statute stop with definitions. If any question arises concerning evidence of a victim's prior sexual history, that question may be presented at an *in camera* hearing where opposing counsel may present evidence, cross-examine witnesses and generally attempt to discern the relevance of proffered testimony in the crucible of an adversarial proceeding away from the jury. In summary, then, [the Rape Shield Statute] merely contains and channels long-held tenets of relevance by providing a statutory

> definition of that relevance and by providing a procedure to test that definition within the context of any particular case. Defendant's substantive right to cross-examine is not impermissibly compromised.

Id. at 42, 269 S.E.2d at 116 (emphasis in original).

When the trial court properly finds proffered evidence is irrelevant or its probative value is substantially outweighed by its prejudicial value, it correctly orders a defendant to abstain from asking about that evidence on cross examination. *See id.* Here, the trial court properly excluded the evidence Defendant sought to introduce as irrelevant under the Rape Shield Statute. The trial court did not violate Defendant's constitutional right to present a complete defense by preventing Defendant from cross-examining the witnesses on irrelevant evidence. *See id.*

V. Conclusion

The trial court correctly excluded the evidence that A.B. had previously engaged in unrelated sexual activity and was punished by her parents under the Rape Shield Statute. Since this evidence was irrelevant, Defendant's constitutional right to present a complete defense was not violated. Defendant received a fair trial free from the prejudicial errors he preserved and argued.

NO ERROR.

Judges CALABRIA and DAVIS concur

STATE v. McQUEEN

[249 N.C. App. 543 (2016)]

STATE OF NORTH CAROLINA
v.
BRIAN MICHAEL McQUEEN, DEFENDANT

No. COA15-1161

Filed 20 September 2016

Jury—selection—Batson challenge

The trial court did not commit clear error by rejecting defendant's *Batson* challenges in a first-degree murder and armed robbery prosecution. It was clear that the trial court properly considered the totality of the circumstances, the credibility of the State, and the context of the peremptory strikes.

Appeal by Defendant from judgments entered 23 July 2014 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 25 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Leslie C. Rawls for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Brian Michael McQueen ("Defendant") appeals following a jury verdict convicting him of first degree murder and robbery with a firearm. Following the verdicts, the trial court imposed a sentence of life without parole. On appeal, Defendant contends he is entitled to a new trial because the trial court clearly erred in denying his *Batson* challenges. We disagree and hold the trial court did not commit error.

I. Factual and Procedural Background

On 24 September 2009, a Lee County grand jury indicted Defendant, a Black male, on one count of first degree murder and one count of robbery with a dangerous weapon. On 30 November 2009, the case was declared a capital offense. At arraignment, Defendant pled not guilty. On 12 July 2012, defense counsel filed a pretrial motion entitled, "Motion to Prohibit District Attorney From Peremptorily Challenging Prospective Black Jurors." In it, Defendant requested the trial court "prohibit the District Attorney from exercising peremptory challenges as to potential black jurors, or in the alternative, to order that the District Attorney

state reasons on the record for peremptory challenges of such jurors." The trial court denied Defendant's motion.

The case was called for trial 5 May 2014. On the jury questionnaires, prospective jurors were asked to answer "yes" or "no" to the question, "Have you or a family member ever been charged with a crime?" Juror 2 answered "no," Juror 10 answered "yes," Juror 11 answered "no," and Juror 12 answered "yes."

On the second day of jury selection, 13 May 2014, prospective Juror 2 was called alone into the jury box. Juror 2 is a seventy-year-old black male who serves as a pastor and works as a security officer. He described his "thoughts about the death penalty" as follows:

> Well, I don't agree with the death penalty because of the fact that . . . my religion says, "Thou Shalt Not Kill," and I don't want to be responsible for taking somebody's life. So I don't agree with the death penalty under no circumstances. But now, as far as going to jail for life, I would agree to that, but not the death penalty. . . . I can't preach one thing and then turn around and do something else.

Juror 2 elaborated, "I'm totally against the death penalty, but maybe in some cases I might would change my mind," such as a defendant who "chop[ped] [a person] into pieces and then maybe burn[ed] them." The State asked to strike Juror 2 for cause, which the trial court denied. The State exercised a peremptory challenge and struck Juror 2. On *voir dire*, defense counsel raised a *Batson* challenge and the trial court found "there is no *prima facie* case" and summoned the next prospective juror.

Juror 10 was called to the jury box on 4 June 2014, the seventeenth day of jury selection. Juror 10 is a thirty-one-year-old black female who works as a line technician. On *voir dire*, the State asked her which crimes she or her family members were charged with. She did not state she was convicted of any crimes, though her records indicated she was convicted of three counts of driving without a license and charged with felony possession of cocaine and possession of drug paraphernalia. When asked about her thoughts about the death penalty, she stated, "no one has the right to take another person's life," because she believes in the Commandment, "Thou Shalt Not Kill."

The State used a peremptory challenge to strike Juror 10 and defense counsel raised a *Batson* challenge. The trial court found Defendant did not establish a *prima facie* case but gave "the State an opportunity to

state race-neutral reasons for the record." The State claimed it struck Juror 10 because of her thoughts regarding the death penalty, and because she failed to disclose her criminal history when the State questioned her. The trial court afforded defense counsel "an opportunity to provide surrebuttal and to show the reasons offered by the State were inadequate or pretextual." On surrebuttal, defense counsel stated religion was not a strong enough basis for a peremptory challenge and that the State did not ask Juror 10 about her criminal charges. The State responded by providing additional reasons for striking Juror 10: when asked whether she believed law enforcement treated her brother fairly, she responded, "I would hope so," with a "smirk" on her face; when asked whether her brother's situation would affect her ability to be fair and impartial to both sides in this case, she paused, looked away, and said, "I have no opinion about any of his situations, he did what he did." The trial court found Defendant did not make out a *prima facie* case for his *Batson* challenge and ordered Juror 10's criminal record to be included in the court file. The trial court stated:

> The Court finds that [the criminal] record certainly provides an additional basis for the State's exercise of a peremptory challenge. However, the Court also finds that the State's bases for the exercise of a peremptory challenge to this juror were adequate, race-neutral and non-discriminatory and non-pretextual, even in the absence of any evidence of the [juror] having any criminal record herself.

Juror 11 was called to the jury box on 9 June 2014, the twentieth day of jury selection. Juror 11 is a sixty-four-year-old black male who works for the North Carolina Department of Transportation. On *voir dire*, he stated his great-niece worked for a potential witness, Mr. Webb, Defendant's former attorney. Juror 11 stated he spoke with Mr. Webb on multiple occasions. Juror 11 also worked with Defendant's grandfather in the 1960s, whom he last saw twelve to fifteen years prior to trial. Although he did not indicate so on the jury questionnaire, Juror 11 was familiar with five names on the witness lists. The record shows Juror 11 pled guilty to four prior charges regarding worthless checks with restitution of $3,869.56 in one of those instances. When asked about the worthless check charges, Juror 11 stated, there were "two or three . . . and the bank would call me, notify me, I [would] go put the money there or what have you." The record also shows Juror 11 was twice charged with driving while his license revoked, though he only referred to a seatbelt violation when the State asked him about previous traffic offenses on *voir dire*.

The State used a peremptory challenge raised concern about Juror 11's truthfulness and criminal history, stating, "[I]f we cannot trust a juror to be honest with us about matters which are essentially public record, then I don't know that we could trust them in terms of them telling use about other matters which are not easily verifiable." Defense counsel raised a *Batson* challenge and alleged the State was disproportionately striking black jurors. In response, the State claimed it struck Juror 11 because of his criminal history, his truthfulness, he knew one of the State's witnesses and four of Defendant's witnesses, his great-niece currently worked for a potential witness, and he previously worked with Defendant's grandfather. The State reiterated, "It's a combination of things. It's a read you get from somebody." On surrebuttal, defense counsel stated there was a "double standard being applied" to black prospective jurors. The trial court denied Defendant's challenge and stated the following:

> The Court finds that the defendant—bear in mind the defendant's low hurdle for the defendant to get over, has stated a *prima facie* case with respect to a *Batson* challenge. However, the Court finds that the State has provided and acted upon race-neutral, non-discriminatory and non-pretextual reasons for exercising its peremptory challenge. . . . [I am] [g]etting a little bit concerned about the rate of challenges, so I just draw that to the attention of counsel. Certainly, as I've indicated, there was ample reason to challenge [Juror 11] and all of the previous jurors that have been struck by the State as well.

Juror 12 was called to the jury box on 11 June 2014, the twenty-second day of jury selection. Juror 12 is a forty-nine-year-old white male who is unemployed and previously worked in construction. He did "computer work" for potential witness Mr. Webb in the past, and Mr. Webb previously represented his wife for a traffic violation. Juror 12 had two worthless check charges with restitution of $10.00 and $20.00 respectively, and was previously charged with assault by pointing a gun and driving without a license. Juror 12 answered directly to all questions regarding previous criminal charges.

The State passed on Juror 12, prompting defense counsel to re-argue its *Batson* challenge regarding Juror 11. Defense counsel argued, "the State is now passing on a white juror when that juror . . . appears to have the same issues that the State used to excuse African American jurors." The State responded and distinguished Jurors 11 and 12, and

emphasized, "his answers regarding past involvement with the court system" were not the "sole reason for challenging [Juror 11]." The State contended Juror 12 had a previous business relationship Mr. Webb, whereas Juror 11's relative currently works for Mr. Webb, and Juror 11 has met with Mr. Webb "three to four times." Moreover, Juror 11's worthless check charges totaled to over $4,000.00 and Juror 12's only totaled to $30.00. Juror 11 did not acknowledge his prior charges and Juror 12 did so without additional questioning. On surrebuttal, defense counsel pointed out the similarities in Juror 11 and 12's criminal records and argued Juror 11 did not have a close relationship with his great-niece or Mr. Webb. The trial court denied defense counsel's *Batson* challenge again, and stated:

> The Court's prior rulings with respect to the *Batson* challenge to [Juror 11] are confirmed in all respects. The previous findings are confirmed. The defendant's . . . renewed *Batson* challenge is denied. State has offered race-neutral reasons for challenging [Juror 11] peremp-torily. Those reasons are non-discriminatory and are non-pretextual.

At the conclusion of jury selection, four out of the fifteen chosen jurors (26.6%) were African American, ten (66.7%) were Caucasian, and one (6.7%) was White American Indian. At trial, after the close of the evidence, the jury that heard the case consisted of three African Americans, eight Caucasians, and one White American Indian. The alternate jurors consisted of one African American and two Caucasians. The record shows the parties questioned eighty-six prospective jurors on *voir dire*. Twenty-one (24.4%) of those prospective jurors identified themselves as African American, fifty-nine (68.6%) as White, one (1.17%) as Asian, one (1.17%) as Hispanic, one (1.17%) as Multiracial, one (1.17%) as Spanish, one (1.17%) as White American Indian, and one (1.17%) as White-Hispanic Mix.

After opening statements, the State presented evidence of two eyewitnesses who identified Defendant, two expert witnesses, statements made by Defendant to police, and photos of the crime scene. The following is a summary of the evidence taken in the light most favorable to Defendant.

In April 2009, Imad Asmar ("Asmar"), a Palestinian, purchased the Jackpot Mini Mart, a convenience store in Sanford, North Carolina. Asmar worked with his brother Ali Mustafa ("Mustafa"), and his son, Ahmad Imad Asmar ("A.J."). Defendant regularly visited the Jackpot Mini Mart.

Around 9:00 p.m. on 17 August 2009, Asmar arrived at the Jackpot Mini Mart while A.J. and Mustafa were working. Asmar's wife and younger son waited in the car while Asmar went inside the store. Asmar told A.J. to take his wife and son something to drink. A.J. took drinks to the two in the parking lot and sat with them in the car. Mustafa came out of the store but returned when a customer arrived. The customer left and Defendant walked towards the store and flashed a peace sign with his hand towards A.J. A.J. recognized Defendant, who had visited the store earlier that day.

Asmar and Mustafa talked at the front counter when Defendant entered the store. Immediately, Defendant walked towards the counter, pulled out a .38 caliber revolver, and shot at Asmar and Mustafa multiple times. Four bullets struck Asmar in the chest, left shoulder, and both arms. Defendant demanded cash and stated, "I need hundreds." Defendant shot Asmar again as Asmar walked towards the exit. Defendant shot Mustafa in the neck, and Mustafa gave Defendant all of the money in the cash register and his pockets. The entire exchange lasted thirty seconds. Defendant walked out of the store and flashed a peace sign at A.J. again before walking into the nearby woods.

Thereafter, Mustafa rushed out of the store and called emergency medical services ("EMS"). Mustafa asked A.J. which direction Defendant fled, and Mustafa relayed Defendant's whereabouts to the 911 dispatcher. Sanford police officers and EMS personnel arrived minutes later. Paramedics took Asmar to the hospital where he later died. An autopsy revealed Asmar was shot four to five times.

Lead investigator Detective Keith Rogers of the Sanford Police Department and Detective Eric Pate presented photo lineups to A.J. and Mustafa separately. Both A.J. and Mustafa identified Defendant as the robber.

Five hours later, police arrested Defendant and took him to the police station. Detective Rogers interviewed Defendant and Defendant claimed he was not involved in the robbery. Later, Defendant stated he accompanied another person who shot the men. Ultimately, Defendant confessed and told police he decided to rob the store but the gun accidentally went off during the robbery when Asmar reached for it. Defendant told officers he got the gun from a man named "Cougar" to rob the store, and he and Cougar split the stolen money. Defendant told police he "didn't want to kill anybody."

On 15 July 2014, the jury convicted Defendant of first degree murder and robbery with a firearm. The trial court imposed a sentence of life without parole. Defendant timely entered his notice of appeal.

II. Standard of Review

"The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *State v. James*, 230 N.C. App. 346, 348, 750 S.E.2d 851, 854 (2013) (citing *State v. Cofield*, 129 N.C. App. 268, 275 n.1, 498 S.E.2d 823, 829 n. 1 (1998)). "Since the trial judge's findings . . . largely will turn on evaluation of credibility a reviewing court ordinarily should give those findings great deference." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citations omitted). "The trial court's ultimate *Batson* decision will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." *Id.* (citation omitted).

III. Analysis

In a capital murder case, the defendant and State are each afforded fourteen peremptory challenges during jury selection. N.C. Gen. Stat. § 15A-1217(a). However, Article I, Section 26 of the Constitution of North Carolina and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution "prohibit race-based peremptory challenges during jury selection." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citation omitted).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court announced a three-part test for *Batson* objections. Our Supreme Court utilized this analysis in *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008), and set out the following test:

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Id. at 527, 669 S.E.2d at 254 (citations omitted). Defendant challenges the first and third prongs of the *Batson* test. He contends the trial court clearly erred in finding he did not make a *prima facie* showing that the State exercised a race-based peremptory challenge to Jurors 2, 10, and 11.

The burden of presenting a *prima facie* showing the State exercised a race-based peremptory challenge is a low hurdle for defendants. *James*, 230 N.C. App. at 349, 750 S.E.2d at 854. The defendant must show that he is a "member of a cognizable racial group and . . . the [State]

has used peremptory challenges to remove from the jury members of the defendant's race." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988). The showing only need be "sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *James*, 230 N.C. App. at 349, 750 S.E.2d at 854 (quoting *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998)).

When the State volunteers its reasons for striking a juror, or the trial court requires the State to give such reasons, prior to making a finding, "the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are credible, nondiscriminatory basis for the challenges or simply pretext." *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996).

After the defendant's *prima facie* showing, the burden shifts to the State to give race-neutral reasons for its strike. Under this second prong, the State must articulate legitimate, clear, and specific reasons which provide a race-neutral explanation for exercising the challenge. *Jackson*, 322 N.C. at 254, 368 S.E.2d at 840. When analyzing these reasons, we "address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State." *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152–53 (1990). Our Supreme Court identified multiple race-neutral reasons a party may rely upon when exercising peremptory challenges: "[r]eservations of a juror concerning his or her ability to impose the death penalty;" a potential juror or relative of the juror's criminal history; reservations about whether law enforcement treated a family member fairly; a potential juror's familiarity with the defendant or defendant's family; excessive eye contact or failure to make appropriate eye contact; or other reasons which correspond to a valid for-cause challenge but do not rise to the level of for-cause excusal. *See State v. Cummings*, 346 N.C. 291, 310, 488 S.E.2d 550, 561; *Porter*, 326 N.C. at 499, 391 S.E.2d at 151; *State v. Carter*, 212 N.C. App. 516, 524, 711 S.E.2d 515, 523 (2011); *State v. Crummy*, 107 N.C. App. 305, 322, 420 S.E.2d 448, 457 (1992); *Hernandez v. New York*, 500 U.S. 352, 362–¬63 (1991).

Following the State's rebuttal, the defendant has a right of surrebuttal to show the State's race-neutral reasons are merely pretext. *Porter*, 326 N.C. at 497, 391 S.E.2d at 150. To determine whether the defendant makes such a showing, "the trial court should consider the totality of the circumstances, including counsel's credibility, and the context of the information elicited." *State v. Cofield*, 129 N.C. App. 268, 279, 498 S.E.2d 823, 831 (1998) (citing *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44,

59 (1997); *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 148 (1991), *cert. denied*, 522 U.S. 824 (1997)).

Our Supreme Court utilized the following factors to determine if a party engaged in purposeful discrimination:

> (1) the susceptibility of the particular case to racial discrimination; (2) whether similarly situated whites were accepted as jurors; (3) whether the [party at issue] used all of its peremptory challenges; (4) the race of the witnesses in the case; (5) whether the early pattern of strikes indicated a discriminatory intent; and (6) the ultimate racial makeup of the jury. In addition, [a]n examination of the actual explanations given by the [party at issue] for challenging black veniremen is a crucial part of testing defendant's *Batson* claim. It is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries.

James, 230 N.C. App. at 351, 750 S.E.2d at 856 (citing *State v. Robinson*, 336 N.C. 78, 93–94, 443 S.E.2d 306, 312–13 (1994), *cert. denied*, 513 U.S. 1089 (1995)).

Recently, the United States Supreme Court reversed the Georgia Supreme Court and found the prosecution engaged in purposeful discrimination in a murder case involving a Black male defendant and an elderly white female victim. *See Foster v. Chatman*, ___ U.S. ___, 136 S.Ct. 1737 (2016). The jury venire list in *Foster* reveals the following: the State made a legend on the list indicating green highlighting "represents Blacks"; the State highlighted the names of Black prospective jurors; "[t]he letter 'B' also appeared next to each [B]lack prospective juror's name; the State wrote "B#1," "B#2," and "B#3," next to the names of three black prospective jurors; the State made a list of "definite NO's," with six names, five of which were black jurors; the State made a note that reads, "Church of Christ . . . NO. No Black Church."; and every jury questionnaire completed by a Black juror had the race circled. *Id.*, ___ U.S. at ___, 136 S.Ct. at 1744. The State gave reasons for striking the jurors that did not involve race. *Id.* ___ U.S. at ___, 136 S.Ct. at 1751. At oral argument Justice Kagan asked, "Isn't this as clear a *Batson* violation as a court is ever going to see?" Relying upon the State's case file and jury notes, the Court held the State's strikes of Black perspective jurors was pretextual and reversed and remanded the case. *Id.* ___ U.S. at ___, 136 at 1753.

When analyzing alleged disparate treatment of prospective jurors, we consider whether the jurors in question are in fact similarly situated. *State v. Waring*, 364 N.C. 443, 490–91, 701 S.E.2d 615, 645 (2010). Our Supreme Court held:

> Merely because some of the observations regarding each stricken venireperson may have been equally valid as to other members of the venire who were not challenged does not require finding the reasons were pretextual. A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics.

Porter, 326 N.C. at 501–502, 391 S.E.2d at 153 (quotations omitted). When there are additional factors that distinguish jurors who are excused from those who are not, and the defendant cannot make a showing of pretext, the defendant fails to meet his burden of proving purposeful discrimination. *See State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988).

Here, the two victims and the eyewitness in this case are Palestinian and Defendant is black. The State exercised a peremptory strike against Juror 2, a black male, who was questioned immediately following a third prospective juror, who was also black and seated on the jury. When questioned about his thoughts concerning the death penalty, Juror 2 stated he would not agree with the death penalty under any circumstances, elaborating he was a pastor and agreeing with the death penalty would make him a hypocrite, and that he might hypothetically agree to the death penalty if a defendant chopped someone into pieces and burned them. Our Supreme Court held that "[r]eservations of a juror concerning his or her ability to impose the death penalty constitute a racially neutral basis for exercising a peremptory challenge." *Cummings*, 346 N.C. at 310, 488 S.E.2d at 561.

The State exercised a peremptory strike against Juror 10, a black female. After Defendant raised a *Batson* challenge, the State explained their bases for the strike: Juror 10's thoughts about the death penalty; her failure to disclose past criminal charges; her reservations about whether law enforcement treated her brother fairly; and her lack of eye contact when asked whether her brother's prosecution would affect her ability to be fair and impartial to both sides of the case. Our courts held the aforementioned bases for exercising the peremptory challenge to be racially neutral. *Id.*; *Porter*, 326 N.C. at 499, 391 S.E.2d at 151; *Crummy*, 107 N.C. App at 322, 420 S.E.2d at 457.

The State exercised a peremptory strike against Juror 11, a black male. The State did not strike Juror 12, a white male. Jurors 11 and 12 were charged with writing worthless checks and driving while license revoked in the past, and both knew a potential witness, Mr. Webb. However, this "state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by [the State] were pretextual." *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831 (citations omitted). As in *Jackson*, there are additional factors distinguish Jurors 11 and 12: Juror 12 responded directly to questions about his criminal charges and Juror 11 minimized his criminal history; Juror 11 avoided questions regarding his family member's criminal charges; and Juror 12 had a business relationship with Mr. Webb, whereas Juror 11 spoke with Mr. Webb on multiple occasions and his great-niece worked for Mr. Webb. 322 N.C. at 257, 368 S.E.2d at 841.

After reviewing the record, it is clear the trial court properly considered the totality of the circumstances, the credibility of the State, and the context of the peremptory strikes against Jurors 2, 10, and 11. *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831 (citations omitted). Therefore, in light of the record, we hold the trial court did not commit clear error in rejecting Defendant's *Batson* objections.

IV. Conclusion

For the foregoing reasons we hold the trial court did not commit error.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED, DEFENDANT

No. COA16-33

Filed 20 September 2016

Search and Seizure—traffic stop—unlawfully extended

The trial court erred by denying defendant's motion to suppress evidence found during a traffic stop for exceeding the speed limit. Defendant's nervousness and possession of a female dog, dog food, coffee, energy drinks, trash, and air fresheners were not sufficient to give the trooper reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop had concluded.

Judge DILLON dissenting.

Appeal by Defendant from a judgment entered 21 July 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

David Michael Reed ("Defendant") filed a motion to suppress evidence found during a traffic stop. On 14 July 2015, Judge Gale Adams entered an order denying Defendant's motion to suppress. On 21 July 2015, Defendant pled guilty, pursuant to a written agreement, to trafficking more than 200 grams but less than 400 grams of cocaine by transportation, and trafficking more than 200 grams but less than 400 grams of cocaine by possession. In exchange for his guilty plea, the State agreed to dismiss charges against his co-defendant, consolidate his two trafficking charges for judgment, and stipulate to an active sentence of 70 to 93 months imprisonment with a $100,000.00 fine. The trial court accepted the plea agreement and sentenced Defendant to 70 to 93 months imprisonment and imposed a $100,000.00 fine and $3,494.50 in court costs. Defendant timely entered his notice of appeal and contends the trial

court committed error in denying his motion to suppress. We agree and reverse the trial court.

I. Factual and Procedural Background

At 8:18 a.m. on 9 September 2014, Defendant drove a rented Nissan Altima faster than the posted 65 mph speed limit on Interstate 95 ("I-95") in Johnston County, North Carolina. His fiancée, Usha Peart, rode in the front passenger seat and held a female pit bull in her lap. Trooper John W. Lamm, of the North Carolina State Highway Patrol, was parked in the median of I-95. Trooper Lamm used his radar to determine Defendant was traveling 78 mph, and performed a traffic stop for Defendant's speeding infraction. Trooper Lamm's patrol car had a camera that faced forwards towards the hood of the vehicle, and recorded audio inside and outside of the patrol car.

Defendant pulled over on the right shoulder of I-95, Trooper Lamm pulled behind him, and Trooper Lamm approached the passenger side of the Nissan. Trooper Lamm saw energy drinks, trash, air fresheners, and dog food scattered on the floor of the vehicle. He asked if the dog in Peart's lap was friendly and Defendant and Peart said that the dog was friendly.

Trooper Lamm stuck his arm inside the vehicle to pet the dog and asked Defendant for his driver's license and the rental agreement. Defendant gave Trooper Lamm his New York driver's license, a registration card, and an Enterprise rental car agreement. The rental agreement listed Peart as the renter and Defendant as an authorized driver. Trooper Lamm told Defendant "come on back here with me" motioning towards his patrol car.

Defendant exited the Nissan and Trooper Lamm asked if he had any guns or knives on his person. Defendant asked Trooper Lamm why the frisk was necessary, and Trooper Lamm replied, "I'm just going to pat you down for weapons because you're going to have a seat with me in the car." Trooper Lamm found a pocket knife, said it was "no big deal," and put it on the hood of the Nissan

Trooper Lamm opened the passenger door of his patrol car. His K-9 was in the back seat of the patrol car at that time. Defendant sat in the front passenger seat with the door open and one leg outside of the car. Trooper Lamm told Defendant to close the door. Defendant hesitated and said he was "scared" to close the door; Lamm replied, "Shut the door. I'm not asking you, I'm telling you to shut the door. I mean you're not trapped, the door [is] unlocked. Last time I checked we were the

good guys." Defendant said, "I'm not saying you're not," and Trooper Lamm said, "You don't know me, don't judge me." Defendant said he was stopped before in North Carolina, but he was never taken to the front passenger seat of a patrol car during a stop. Following Trooper Lamm's orders, Defendant closed the front passenger door.

Trooper Lamm ran Defendant's New York license through record checks on his mobile computer. While doing so, Trooper Lamm asked Defendant about New York, and "where are y'all heading to?" Defendant said he was visiting family in Fayetteville, North Carolina. Trooper Lamm noted the rental agreement restricted travel to New York, New Jersey, and Connecticut, but told Defendant the matter could likely be resolved with a phone call to the rental company.

Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past, when he was in the military. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan. Trooper Lamm noticed the rental agreement was drafted for a Kia Rio not a Nissan Altima. Trooper Lamm exited the patrol car to ask Peart for the correct rental agreement, and told Defendant to "sit tight."

Trooper Lamm approached the front passenger side of the Nissan Altima and asked Peart for the correct rental agreement. He asked about her travel plans with Defendant and the nature of their trip. She said they were visiting family in Fayetteville but might also travel to Tennessee or Georgia. She explained the first rental car they had, the Kia Rio, was struck by another car and the rental company gave them the Nissan Altima as a replacement. She could not find the rental agreement for the Nissan Altima and continued to look for it. Trooper Lamm told Peart he was going to issue Defendant a speeding ticket and the two would "be on [their] way."

Trooper Lamm returned to the patrol car, explained Peart could not locate the correct rental agreement, and continued to question Defendant about the purpose of the trip to Fayetteville. Then, Trooper Lamm called the rental company and the rental company confirmed everything was fine with the Nissan Altima rental, but informed Trooper Lamm that Peart still needed to call the company to correct the restricted travel condition concerning use of the car in New York, New Jersey, and Connecticut. After the call, Trooper Lamm told Defendant that his driver's license was okay and he was going to receive a warning ticket for speeding. Trooper Lamm issued a warning ticket and asked Defendant if he had any questions.

Then, Trooper Lamm told Defendant he was "completely done with the traffic stop," but wanted to ask Defendant additional questions. Defendant did not make an audible response, but at the suppressing hearing, Trooper Lamm testified Defendant nodded his head. Trooper Lamm did not tell Defendant he was free to leave.

Trooper Lamm asked Defendant if he was carrying a number of controlled substances, firearms, or illegal cigarettes in the Nissan Altima. Defendant responded, "No liquor, no nothing, you can break the car down." Trooper Lamm continued questioning Defendant and said, "I want to search your car, is that okay with you?" Defendant hesitated, mumbled, and told Trooper Lamm to ask Peart. Defendant stated, "I'm just saying, I've got to go to the bathroom, I want to smoke a cigarette, we're real close to getting to the hotel so that we can see our family, like, I don't, I don't see a reason why." Trooper Lamm responded, "[W]ell let me go talk to her then, sit tight," and walked to the front passenger side of the Nissan Altima. By this time, two additional officers were present at the scene.

Trooper Lamm told Peart everything was fine with the rental agreement and asked her the same series of questions he asked Defendant, whether the two were carrying controlled substances, firearms, or illegal cigarettes. Trooper Lamm asked Peart if he could search the car. Peart hesitated, expressed confusion, and stated, "No. There's nothing in my car, I mean . . . ." Trooper Lamm continued to ask for consent, Peart acquiesced and agreed to sign a written consent form. Trooper Lamm searched the Nissan Altima and found cocaine under the back passenger seat.

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

Defendant contends the trial court made findings of fact that are not supported by competent evidence because his "initial investigatory detention was not properly tailored to address a speeding violation."

Further, he contends Trooper Lamm seized him without consent or reasonable suspicion of criminal activity when Trooper Lamm told him to "sit tight" in the patrol car. Defendant contends Trooper Lamm unlawfully seized items from the car during the search, and these items are fruit of the poisonous tree that must be suppressed. After carefully reviewing the record and video footage of the traffic stop, we agree.

On appeal, Defendant challenges the following findings of fact and conclusion of law:

> FINDINGS OF FACT
>
> 11. That the Defendant complied with Trooper Lamm's request[1] to accompany him back to the patrol vehicle where Trooper Lamm told the Defendant, while the Defendant was still outside the vehicle, that he was stopped for speeding, which the Defendant acknowledged stating that he "was running about 84" . . . .
>
> 21. That while Ms. Peart looked for the current rental agreement, which was never found, Trooper Lamm engaged her in casual conversation and learned from her that she was unsure of their travel plans, but believed they were visiting family in "Fayetteville or maybe Tennessee or Georgia. . . ."
>
> 26. That after asking the Defendant if he could search his car, the [D]efendant expressed reluctance before directing Trooper Lamm to ask Ms. Peart since she was the lessee of the vehicle. At which time, Trooper Lamm left the patrol car, asked the Defendant to sit tight, and went to ask Ms. Peart. . . .
>
> CONCLUSIONS OF LAW
>
> 2. That Trooper Lamm was at all times casual and conversational in his words and manner.

"[T]he tolerable duration of police inquires in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *State v. Bedient*, ___ N.C. App. ___, 786 S.E.2d 319, 322 (2016) (quoting *Rodriguez v. United States*, ___ U.S. ___, ___, 135 S.Ct. 1609, 1614 (2015)

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1. Defendant contends the trial court's "determination of [Trooper] Lamm's statement to be a 'request' rather than a command or order is actually a conclusion of law . . . because it requires the exercise of judgment."

(internal citations omitted)). In addition to deciding whether to issue a traffic ticket, a law enforcement officer's "mission" includes "'ordinary inquires incident to the traffic stop.' " *Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322 (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615). This inquiry typically includes checking the driver's license, determining if the driver has any outstanding warrants, inspecting the vehicle's registration and proof of insurance, or a rental agreement for a rental car, which is the equivalent of inspecting a vehicle's registration and proof of insurance. *See Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322–23 (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615); *See also State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746, 751 (2016), *writ of supersedeas allowed*, 786 S.E.2d 927 (2016).

The trial court held its suppression hearing 1 June 2015 and issued an order denying Defendant's motion to suppress on 10 July 2015. If the trial court had the benefit of this Court's guidance in *Bullock*, ___ N.C. App. ___, 785 S.E.2d 746, it may have ruled in Defendant's favor.

In *Bullock*, this Court examined a fact pattern that is nearly identical to the case *sub judice* and applied the principles of *Rodriguez*, ___ U.S. ___, 135 S.Ct. 1609. In *Bullock*, the defendant sped and followed another vehicle too closely on the highway. *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 747–48. When the officer pulled Bullock over, he asked for Bullock's license and rental agreement. *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 748. The rental agreement did not list Bullock's name, though it appeared he wrote his name on the form below the renter's signature. *Id.* The officer saw two cell phones in the car and noticed Bullock's hands were "trembling a little." *Id.* The officer asked Bullock where he was traveling. *Id.* Bullock said he was driving to meet a girl and missed his exit on the highway. *Id.* The officer "asked [Bullock] to step back to his patrol car while he ran [Bullock's] driver's license." *Id.* The officer "shook hands with [Bullock] and told him that he would give him a warning for the traffic violation." *Id.* The officer "then asked if he could briefly search [Bullock] for weapons before he got into his patrol car." *Id.* Bullock "agreed and lifted his arms up in the air . . . ." *Id.* Bullock sat in the front seat of the patrol car as the officer ran his driver's license through a mobile computer. *Id.* The officer's K-9 was in the back seat. *Id.* While the officer and Bullock sat in the front seats, the officer questioned Bullock. *Id.* The officer thought Bullock "looked nervous while he was questioning him . . ." and saw he was "'breathing in and out in his stomach' and not making much eye contact." *Id.* The officer attributed this nervousness "to something other than general anxiety from a routine traffic stop" because he already told Bullock he was going to

issue a warning ticket. *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 751. The officer asked Bullock "if there were any weapons or drugs in the car and if he could search the vehicle." *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 748. Bullock consented to the search except for his personal belongings, which included a bag, some clothes, and condoms. *Id.* The officer called for a backup officer and explained he could not search without another officer present. *Id.* While they waited approximately ten minutes for a backup officer to arrive, Bullock asked "what would happen if he did not consent to a search of the car," and the officer stated "he would then deploy his K-9 dog to search the car." *Id.* "At that time, [Bullock] and [the officer] spoke some more about the girl [Bullock] was going to see and other matters unrelated to the traffic stop." *Id.* The backup officer arrived, searched the car, and found 100 bindles of heroin. *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 749.

The *Bullock* Court applied the United States Supreme Court's guidance in *Rodriguez* and held the officer could check Bullock's license and rental agreement, but he "was not allowed to 'do so in a way that prolonged the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.' " *Id.*, ___ N.C. App. at ___, 785 S.E.2d at 751 (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615). This Court held, "[the officer] completed the mission of the traffic stop when he told [Bullock] that he was giving [Bullock] a warning for the traffic violations as they were standing at the rear of [Bullock's] car." *Id.*

Here, Trooper Lamm's authority to seize Defendant for the speeding infraction ended "when tasks tied to the traffic infraction [were]—*or reasonably should have been*—completed." *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1614 (emphasis added) (citation omitted). At the very latest, this occurred when Trooper Lamm told Defendant he was going to issue a warning ticket and gave him a hard copy of the warning ticket. *See Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751. Beyond this identifiable point in time, this Court notes an officer may not delay telling a driver they are going to receive a ticket (or warning ticket), withhold writing or providing a written copy of the ticket (or warning ticket), withhold the driver's license, car registration, rental agreement, or other pertinent documents, in such a way that prolongs "'the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.' " *Id.* (quoting *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615).

Prior to *Rodriguez*, it was well settled that an officer may ask a driver to exit a vehicle during a traffic stop. *See State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002) (citations omitted). Historically, the *de minimis* intrusion of asking a driver to exit a vehicle was outweighed

by "the government's 'legitimate and weighty' interest in officer safety . . . ." *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam)). However, "under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 752. Therefore, an officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle. *See Id.* The same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down.[2] It is also possible for an officer to unlawfully extend a traffic stop by telling a driver to close the patrol car's front passenger door, while the officer questions the driver about matters unrelated to the traffic stop. Further, this Court notes officer safety is put at risk an increased number of times when an officer adds additional steps to delay the traffic stop, such as ordering the driver to step out of the vehicle, patting the driver down, having the driver sit in the patrol car, and sitting next to the driver to ask them questions and observe their demeanor.

To detain a driver beyond a traffic stop, an officer must have "reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (citing *Florida v. Royer*, 460 U.S. 491, 497–98 (1983)) (citation omitted). An officer is "required to have reasonable suspicion before asking [a] defendant to go to his patrol vehicle to be questioned." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 753. During a lawful traffic stop, an officer "may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, *when the officer is justified in believing that the individual is armed and presently dangerous*." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 24 (1968); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)) (emphasis added).

Here, the trial court found Trooper Lamm had "sufficient reasonable suspicion of criminal activity to continue the traffic stop beyond the speeding enforcement action" for the following reasons:

> a. Defendant was overly nervous for a traffic stop for speeding.

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2. "By requiring defendant to submit to a pat-down search and questioning in the patrol car unrelated to the purpose of the traffic stop, the officer prolonged the traffic stop beyond the time necessary to complete the stop's mission and the routine checks authorized by *Rodriguez*." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 753 (citing *State v. Castillo*, ___ N.C. App. ___, 787 S.E.2d 48 (2016)).

b. Defendant would not close the patrol car door until ordered to do so, stating that he was "scared to do that" and had one leg out of the door.

c. Defendant gave the Trooper a rental agreement for a different car than he was operating and that car was paid for in cash.

d. Defendant was operating the car outside of the approved area for travel, New York, New Jersey, and Connecticut.

e. He noted the presence of numerous air fresheners in the vehicle.

f. The vehicle had a lived in look showing hard travel, such as, coffee, energy drinks, and trash.

g. The presence of a female dog in the car and dog food scattered throughout the car.

h. The driver and passenger provided inconsistent travel plans.

The trial court's findings do not support its conclusion that Trooper Lamm had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop concluded. The various legal behaviors in the trial court's findings do not amount to a "reasonable articulable suspicion that illegal activity is afoot." *Williams*, 366 N.C. at 116, 726 S.E.2d at 166–67 (citing *Royer*, 460 U.S. at 497–98) (citation omitted). "In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [a suspicious but legal behavior] is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel." *State v. Fields*, 195 N.C. App. 740, 745, 673 S.E.2d 765, 768 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9 (1989)). Reasonable suspicion may arise from "wholly lawful conduct." *Reid v. Georgia*, 448 U.S. 438, (1980) (citing *Terry*, 392 U.S. at 27–28). However, "'the relevant inquiry is . . . the degree of suspicion that attaches to particular types of noncriminal acts.' " *Sokolow*, 490 U.S. at 10 (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 n. 13 (1983)).

Here, Defendant's nervousness is "an appropriate factor to consider," but it must be examined "in light of the totality of the circumstances" because "many people do become nervous when [they are] stopped by an officer . . . ." *State v. McClendon*, 350 N.C. 630, 638, 517

S.E.2d 128, 134 (1999) (citations omitted). The degree of suspicion attached to Defendant's possession of a female dog, dog food, coffee, energy drinks, trash, and air fresheners is minimal, as it is consistent with innocent travel.

Most importantly, the trial court's findings are based upon facts that were discovered after the "tolerable duration" of the speeding stop expired, namely Defendant's nervousness and his fear about closing the front passenger door of the patrol car. *See Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322 (quoting *Rodriguez*, ___ U.S. ___, ___, 135 S.Ct. at 1614). *Rodriguez* clearly changes the law and traffic stop procedures that existed prior to its issuance on 21 April 2015. To affirm the trial court, as the dissent suggests, is to ignore the United States Supreme Court's direction in *Rodriguez*, ___ U.S. ___, 135 S.Ct. 1609.

IV. Conclusion

For the foregoing reasons, we reverse the trial court.

REVERSED.

Chief Judge McGEE concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Because I agree with the State that Judge Adams' findings support a conclusion that Trooper Lamm obtained Defendant's consent to search the rental vehicle *after* the traffic stop had concluded and Defendant was otherwise free to leave, I respectfully dissent.

Assuming, *arguendo*, that Trooper Lamm's exchange with Defendant following the conclusion of the traffic stop was non-consensual and that Defendant's "consent" was coerced, I believe that Trooper Lamm had *reasonable suspicion* of separate, independent criminal activity to support an extension of the traffic stop beyond the time necessary to complete the mission of citing Defendant for the traffic violation.

I. There Was the Consensual Search After Traffic Stop Had Concluded and Defendant Was Free to Leave.

Judge Adams' findings support her conclusion that Trooper Lamm obtained Defendant's voluntary consent after Defendant was otherwise free to leave the scene.

The majority contends that Defendant's consent to search the car was ineffective since Trooper Lamm impermissibly extended the traffic stop in violation of the principles set out in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). *See also Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (holding that a defendant's consent to a search is ineffective to justify the search when the consent is obtained while the defendant is being illegally detained). *Rodriguez* is certainly an important development in Fourth Amendment law, clarifying that even a *de minimis* extension of a traffic stop to investigate matters unrelated to the mission of the traffic stop without reasonable suspicion of separate criminal activity is impermissible. However, this principle in *Rodriguez* is inapplicable here as Trooper Lamm did not extend the traffic stop to question Defendant and then search Defendant's rental vehicle. Rather, Judge Adams' findings show that Trooper Lamm concluded the traffic stop and then obtained Defendant's consent only *after* his exchange with Defendant evolved into a consensual encounter. For the same reasons, our case is distinguishable from our recent decision in *State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746 (2016), which is cited by the majority, where we applied *Rodriguez* to invalidate a search based on the impermissible extension of a traffic stop. *Bullock* did not involve a situation where a traffic stop had concluded and the encounter became consensual.

There is no detention for Fourth Amendment purposes when law enforcement engages with a defendant unless a reasonable person in the defendant's position "would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In the context of a traffic stop, the detention of a motorist is a seizure for Fourth Amendment purposes. However, when the traffic stop is over and the detainee is free to leave, the traffic stop transforms into a consensual encounter: the officer may ask questions, and the detainee can choose to answer them or simply refuse to answer and leave.

Our Court has held on a number of occasions that "[g]enerally, an initial traffic stop concludes and the encounter becomes consensual . . . after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009). *See also State v. Henry*, 237 N.C. App. 311, 324, 765 S.E.2d 94, 104 (2014) (recognizing that "a traffic stop is not terminated until after the officer returns the driver's license or other documents to the driver"); *State v. Cottrell*, 234 N.C. App. 736, 742-43, 760 S.E.2d 274, 279 (2014) (restating the general principle that the return of motorist documentation typically renders any subsequent exchanges between motorist and law enforcement consensual). In *State v. Kincaid*, we recognized that "subject to

a totality of the circumstances test, that once an officer returns the license and registration, the stop is over and the person is free to leave." 147 N.C. App. 94, 99, 555 S.E.2d 294, 298 (2001).

Likewise, the Fourth Circuit Court of Appeals has consistently held that a motorist is no longer detained after the officer gives the motorist his or her license and other paperwork, absent some other factor which might indicate restraint. *See, e.g.*, *United States v. Sullivan*, 138 F.3d 126, 133-34 (4th Cir. 1998); *United States v. Whitney*, 391 F. App'x. 277, 280-81 (4th Cir. 2010); *United States v. Meikle*, 407 F.3d 670, 673-74 (4th Cir. 2005).

Here, Judge Adams found that Trooper Lamm did not seek Defendant's consent to search the rental car until *after* returning Defendant's paperwork back to him and informing Defendant that the traffic stop had concluded. There is no finding to suggest any restraint or compulsion by Trooper Lamm when he obtained Defendant's consent to search the rental vehicle. That is, Trooper Lamm did not simply launch into an interrogation after returning to Defendant his license and other paperwork. Rather, Judge Adams found that Trooper Lamm took the extra step of first *asking* Defendant for his consent to question him further. *See Kincaid*, 147 N.C. App. at 102, 555 S.E.2d at 300 (holding in a similar situation when the officer "asked if he could question defendant . . . [,] [he] did not deprive defendant of freedom of action in any significant way. After [the officer] handed back defendant's license and registration, defendant was free to leave and free to refuse to answer questions"). Judge Adams also found that Trooper Lamm "was at all times casual and conversational in his words and manner."[1] *See Sullivan*, 138 F.3d at 133 (finding relevant that "there is no indication that [the officer] employed any physical force or engaged in any outward displays of authority"). Also significant is that the questioning occurred on a public highway during the daytime.

It is true that there is no indication (or finding) that Trooper Lamm ever told Defendant that he "was free to leave." The United States Supreme Court, however, has held that an officer is *not required* to inform a detainee that he is free to leave to transform a traffic stop into a consensual encounter. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (concluding that it would "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may

1. Defendant challenges the finding regarding the casualness of the conversation; however, he does not challenge this finding with regards to any portion of the encounter occurring after Trooper Lamm informed Defendant that the traffic stop was completed.

be deemed voluntary."). The Fourth Circuit has reached this same conclusion. *Sullivan*, 138 F.3d at 133 ("While [the officer] never told [the defendant] that he was free to go, that fact alone is not dispositive.") And our Court has also reached this same conclusion. *Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297 (affirming the trial court's conclusion that the defendant was free to leave "although the officer never told defendant that he was free to leave").

It is also true that Judge Adams found that *after* Defendant gave Trooper Lamm consent to search the rental vehicle (subject to Ms. Peart's consent), Trooper Lamm asked Defendant to "sit tight" in the unlocked patrol car while he returned to the rental vehicle to ask Ms. Peart for her consent, which she gave. Given the context of Trooper Lamm's request that Defendant "sit tight," I believe that a reasonable person in Defendant's position would have still felt that he could have withdrawn his consent and terminated the encounter.[2] Trooper Lamm only "asked" Defendant to sit tight and only did so *after* Defendant had already given his consent and *after* Defendant "direct[ed] Trooper Lamm to ask Ms. Peart" for her consent.[3]

In conclusion, I believe that Defendant gave consent to search the car after the traffic stop concluded and the encounter between Defendant and Trooper Lamm became consensual. Therefore, I would affirm Judge Adams' order.

II. Trooper Lamm Otherwise Had Reasonable Suspicion to Extend the Stop.

Assuming, *arguendo*, that the traffic stop did not become consensual after Trooper Lamm returned all of the paperwork to Defendant, informed Defendant that the traffic stop had concluded, and asked Defendant for his consent to question him further, I believe that Judge Adams' findings support her conclusion that Trooper Lamm had reasonable suspicion that Defendant was transporting illegal drugs.

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2. By this point, another officer was on the scene who remained with Defendant while Trooper Lamm sought Ms. Peart's consent to search the vehicle. Defendant could have simply told this other officer that he was withdrawing his consent and that he was going to leave.

3. Defendant does not make any argument concerning whether *Ms. Peart* would not have felt free to leave when *she* gave *her* consent to search the vehicle or any argument about the impact the validity of Ms. Peart's consent should have on our analysis in this prosecution of Defendant. Therefore, any issue concerning Ms. Peart's consent is not before us.

The majority likens this case to our recent decision in *Bullock*, which applied *Rodriguez* and held that a traffic stop cannot be extended beyond the time necessary to complete the mission of the traffic stop (issuing the citation, processing tags, reviewing driver's license information, etc.), without reasonable suspicion of some other crime being afoot. *Bullock* , ___ N.C. App. at ___, 785 S.E.2d at 752. Admittedly, there are similarities between the facts in *Bullock* and Judge Adams' findings in the present case. Specifically, in *Bullock*, our Court determined that the defendant's presence on a busy interstate typically used for drug trafficking, the defendant's unauthorized operation of a rental vehicle,[4] the defendant's nervous behavior, and the defendant's statement that he had missed an exit to explain his erratic driving did not give rise to a "particularized suspicion of criminal activity" permitting extension of the traffic stop to conduct a frisk of the defendant. *Id.* at ___, 785 S.E.2d at 753-56. In reaching its conclusion, our Court relied on the Fourth Circuit's acknowledgment that:

> [T]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion. On the other hand, the articulated innocent factors collectively *must serve to eliminate a substantial portion of innocent travelers* before the requirement of reasonable suspicion will be satisfied.

Id. at ___, 785 S.E.2d at 754 (quoting *U.S. v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011)) (emphasis added) (internal citations and marks omitted).

Judge Adams found additional facts which, I believe, distinguish this case from *Bullock*. For instance, the trial court found that the following events occurred before Trooper Lamm committed any act which could arguably be related to the traffic stop:

> 6. Trooper Lamm observed a female in the front passenger seat holding an adult female pit bull dog and defendant in driver's seat.
>
> 7. Trooper Lamm noticed the presence of . . . dog food scattered throughout the interior of the vehicle.
>
> 8. Trooper Lamm knew that the presence of a female dog and dog food are sometimes used to distract a male canine during a dog sniff.

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4. The rental agreement in the present case only allowed the vehicle to be driven in New York, New Jersey, and Connecticut.

> 9. Trooper Lamm noticed several air fresheners which Trooper knew are sometimes used to mask the odor of a controlled substance.

Indeed, in *Digiovanni*, which was relied upon by our Court in *Bullock*, the Fourth Circuit opined that the presence of air fresheners would have had an impact on their determination that no reasonable suspicion existed to extend the stop. *Digiovanni*, 650 F.3d at 513. I believe that these additional findings were sufficient to "eliminate a substantial portion of innocent drivers," *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 754, and supported the conclusion that Trooper Lamm had reasonable suspicion that criminal activity was afoot to justify an extension of the traffic stop. *See State v. Warren*, ___ N.C. App.___, ___, 775 S.E.2d 362, 365-66 (2015) (holding that *Rodriguez* was not violated and that there was reasonable suspicion to conduct a dog sniff search).

STATE OF NORTH CAROLINA
v.
ANTHONY MAURICE ROBINSON, DEFENDANT

No. COA15-1358

Filed 20 September 2016

1. Appeal and Error—notice of appeal—timely but imperfect—writ of certiorari

Defendant's petition for writ of certiorari to review his prior record calculation and a Satellite Based Monitoring Order was granted where his written notice of appeal was timely but imperfect. Defendant had a statutory right to appeal both issues and the petition for writ of certiorari was granted in the interest of justice.

2. Sentencing—prior record level—Michigan offense—prior record level

The trial court did not err by sentencing defendant as a record level IV offender where a Michigan felony made the difference between a record level III and IV. Neither the State nor defendant attempted to prove at trial that the Michigan conviction was substantially similar to a North Carolina felony or misdemeanor, and defendant argued on appeal that the worksheet did not clearly show that the Michigan conviction was a felony in Michigan. However, defendant stipulated to the Michigan conviction and its

classification at the default level of a Class I felony, both on his worksheet and during his plea agreement, and the stipulation and his agreement were effective and binding.

3. Sentencing—boxes checked on form—clerical error

The trial court's error in checking an additional, inapplicable, box on the form for the sex offender registry and Satellite Based Monitoring when sentencing defendant for attempted statutory rape and other offenses. The error was merely clerical, to be corrected on remand.

On writ of certiorari to review judgments entered on or about 6 July 2015 by Judge Jeffrey P. Hunt in Superior Court, Burke County. Heard in the Court of Appeals 26 April 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph L. Hyde, for the State.

Hollers & Atkinson, by Russell J. Hollers III, for defendant-appellant.

STROUD, Judge.

Defendant Anthony Maurice Robinson appeals from the judgments entered on his plea of guilty to one count of attempted statutory rape consolidated with one count of attempted statutory sex offense and one count of indecent liberties with a minor child. Defendant contends that the trial court erred in sentencing him as a prior record level IV offender and in finding that he had been convicted of an offense against a minor as a basis for imposing its sex offender registry and satellite-based monitoring orders. Defendant seeks the judgments against him to be vacated and remanded for new hearings. We affirm in part and remand in part to the trial court for the correction of clerical errors.

I. Background

On 6 July 2015, defendant pled guilty pursuant to a plea agreement to one count of attempted statutory rape consolidated with one count of attempted statutory sex offense and one count of indecent liberties with a minor child. The State provided a factual summary to the court noting that defendant, age 39 at the time, and Rachel,[1] age 13 at the time,

1. A pseudonym is used to protect the identity of the minor child.

met through a mutual friend in December 2011. The two began a sexual relationship, in which they engaged in multiple instances and various forms of sexual contact over two months. This relationship continued until February 2012, when Rachel's mother discovered text messages between Rachel and defendant on Rachel's phone as well as a letter from Rachel to defendant expressing her love for him and desire to bear his child.

Defendant stipulated to a prior record level worksheet presented by the State which listed defendant's prior convictions in North Carolina. The worksheet showed a total of 11 points, including 9 points from North Carolina convictions and 2 points for a Michigan conviction, so defendant was a prior record level IV offender for sentencing purposes. During his plea colloquy, defendant again stipulated to the calculation and his status as a prior record level IV offender.

The trial court sentenced defendant in the presumptive range to consecutive terms, a minimum of 190 and a maximum of 288 months imprisonment for the consolidated attempted statutory rape and sex offense charges, followed by a minimum of 20 months and a maximum of 33 months imprisonment for the charge of indecent liberties with a minor child. Defendant was further ordered upon release to register as a sex offender and to enroll in satellite based monitoring ("SBM"), both for the remainder of his natural life.

On or about 13 July 2015, defendant filed a *pro se* written notice of appeal, but defendant's notice failed to designate the judgment or order from or the court to which the appeal was taken, failed to provide certificate of service on the State, and was not signed by defendant. On 27 January 2016, defendant filed a petition for writ of certiorari seeking review of his prior record level calculation for sentencing purposes and the judgment committing him to sex offender registry and SBM for the rest of his natural life.

II. Right to Appeal

[1] We must first determine whether defendant has a right to appeal his prior record level calculation or the SBM order. " 'A defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings.' " *State v. Singleton*, 201 N.C. App. 620, 623, 689 S.E.2d 562, 564 (2010)(quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)) (brackets omitted). N.C. Gen. Stat. § 15A-1444(a2)(1) (2015) provides, in pertinent part:

> (a2) A defendant who has entered a plea of guilty . . . to a felony . . . in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> > (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21.

A plea of guilty to a felony does not extinguish a defendant's right to appeal, but that right "is not without limitations." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). "If a defendant who has pled guilty does not raise the specific issues enumerated in subsection (a2) and does not otherwise have a right to appeal, his appeal should be dismissed." *Id.*

Here, defendant pled guilty to the charged offenses pursuant to a plea arrangement. Yet defendant does not seek to appeal his guilty plea but rather he seeks review of his prior record level calculation and sentencing based upon that calculation. Defendant gave timely, though imperfect, written notice of appeal. He then filed a petition for certiorari, which we address below. But defendant did have a right to appeal his prior record level calculation pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1) despite his guilty plea since defendant contends that his prior record level was calculated erroneously. *See State v. Mungo*, 213 N.C. App. 400, 403-04, 713 S.E.2d 542, 544-45 (2011) (holding the defendant had a right to appeal the calculation of his prior record level pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1)).

Regarding defendant's right to appeal the trial court's SBM order, this Court has held that such "proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (quotation marks and brackets omitted). "As the SBM order is a final judgment from the superior court, we hold that this Court has jurisdiction to consider appeals from SBM monitoring determinations under N.C. Gen. Stat. § 14-208.40B pursuant to N.C. Gen. Stat. § 7A-27." *Singleton*, 201 N.C. App. at 626, 689 S.E.2d at 566. Defendant seeks to appeal the trial court's SBM order against him because he contends that the order was based on an erroneous finding. Despite the fact that defendant pled guilty, we recognize, as we did in *Singleton*, defendant's right to appeal the trial court's SBM order pursuant to N.C. Gen. Stat. § 7A-27 (2015).

"[T]his Court has generally granted *certiorari* under N.C.R. App. P. 21(a)(1) when a defendant has pled guilty but lost the right to appeal the calculation of [his] prior record level through failure to give proper

oral or written notice." *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013). Furthermore, this Court has recognized the right of a defendant to appeal from an SBM order and granted certiorari when a defendant failed to give proper notice of appeal pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure. *Brooks*, 204 N.C. App. at 195, 693 S.E.2d at 206 ("N.C.R. App. P. 3(a) requires that a party file notice of appeal with the clerk of superior court and serve copies thereof upon all other parties." (Quotation marks and brackets omitted)).

Defendant's failure to file proper notice of appeal would necessitate the dismissal of his appeal despite this Court's recognition of defendant's right to appeal in this matter. Therefore, "[i]n the interest of justice, and to expedite the decision in the public interest," we grant defendant's petition for writ of certiorari and address the merits of both issues on appeal. *Brooks*, 204 N.C. App. at 195, 693 S.E.2d at 206.

II. Prior Record Level

[2] Defendant first argues that the trial court erred by sentencing him as a prior record level IV offender since the State failed to provide information to the trial court as to whether defendant's prior Michigan conviction for failure to register as a sex offender was classified as a felony or a misdemeanor in Michigan or if it was substantially similar to a North Carolina felony. Had the Michigan conviction not been counted as a Class I felony, defendant would have been considered a prior record level III offender with nine prior record level points for sentencing purposes. Defendant claims the trial court erred and requests his case be remanded for resentencing. We disagree.

> We review the calculation of an offender's prior record level as a conclusion of law that is subject to *de novo* review on appeal. It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review.

Mungo, 213 N.C. App. at 404, 713 S.E.2d at 545 (quotation marks and brackets omitted).

When considering convictions from other jurisdictions for calculation of a defendant's prior record level, the trial court must consider them as follows:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina

> is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2015).

Neither the State nor defendant proved or attempted to prove that the Michigan conviction was substantially similar to a North Carolina felony or misdemeanor, respectively, and neither brief attempts to argue that point. The State did not seek to prove that the Michigan conviction was substantially similar to a North Carolina felony of a higher class in defendant's prior record level calculation. Thus, the State chose to use the prior Michigan conviction at the default level as a Class I felony for the purpose of calculating defendant's prior record level. Therefore, we only review whether the trial court erred in calculating defendant's prior record level in considering the Michigan conviction as a Class I felony.

Defendant's argument arises entirely from the way that the Michigan crime is listed on the worksheet. The worksheet includes a typed list of 15 North Carolina convictions, with all but one identified in the last column of the list -- entitled "Class" -- as either F, A1m, 2m, 3m, 1t, or 2t.[2] These abbreviations indicate the class of the offense, respectively:

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2. Defendant's record level was calculated on the standard form entitled "Worksheet Prior Record Level for Felony Sentencing and Prior Conviction Level for Misdemeanor Sentencing," Form AOC-CR-600, Rev. 4/11.

felony; misdemeanor class A1, 2, or 3; and misdemeanor class 1 or 2 under Chapter 20 (traffic offenses). N.C. Gen. Stat. § 15A-1340.21(b) (2015). Only the Michigan conviction is handwritten on the form, described as follows:

Source code	Offenses	File No.	Date of Conviction	County (name of State if not NC)	Class
	Failure to Register -- Sex Offender	6207711-FH	5-12-06	Oakland Co., MI	I

The appropriate number of points are assigned to each offense as listed on the worksheet, treating the Michigan offense at issue as a Class I felony.

Defendant argues that since the worksheet does not clearly show that his Michigan conviction is classified as a felony in Michigan, "[t]his leaves us with a stipulation to imprecise facts beyond the existence of the conviction and the name of the offense, which does not explicitly state its category as felony or misdemeanor." The State did not present any evidence regarding the Michigan conviction or its classification in Michigan. The State argues that the Michigan conviction was clearly identified on the worksheet and was classified as "I," which is the default classification for an out-of-state felony conviction.

In addition, the State points out that a defendant can stipulate to whether an out-of-state conviction is a felony or misdemeanor, although he cannot stipulate to whether the conviction is "substantially similar" to a North Carolina felony classified above Class I.

> According to the statute, the default classification for out-of-state felony convictions is Class I. Where the State seeks to assign an out-of-state conviction a more serious classification than the default Class I status, it is required to prove by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony. . . . However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required. Unless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class

> I felonies or higher, the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes.
>
> Thus, while the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is substantially similar to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

State v. Bohler, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009) (citations, quotation marks, and brackets omitted).

This Court has noted that "[w]hile we recognize that a prior record level worksheet alone is insufficient to prove the *existence* of a prior conviction, . . . it is the *classification*, rather than the mere existence, of the [out-of-state] conviction that is at issue in the instance case." *State v. Threadgill*, 227 N.C. App. 175, 179, 741 S.E.2d 677, 680 (2013), *cert. denied*, __ U.S. __, 187 L. Ed. 2d 821, 134 S. Ct. 961 (2014). In *Threadgill*, this Court concluded that the defendant's silence "regarding the worksheet's classification of the [out-of-state] conviction as a Class I felony constituted a stipulation with respect to that classification." *Id.* at 180, 741 S.E.2d at 681. *See also State v. Eubanks*, 151 N.C. App. 499, 506, 565 S.E.2d 738, 743 (2002) ("Likewise, we hold that the statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet. We also note that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist.").

Here, the plea colloquy shows that defendant similarly raised no questions or objections regarding the information listed on the worksheet and that he stipulated to the record level as calculated on it:

> THE COURT: All right, then we have an agreement of a prior record level of IV; is that right?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> [THE STATE]: Yes, sir.

In *State v. Edgar*, __ N.C. App. __, 777 S.E.2d 766 (2015), we held that the trial court may accept a stipulation that an out-of-state offense is classified as a misdemeanor or a felony:

> "[W]hile [the] trial court may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction."

Id. at __, 777 S.E.2d at 769-70 (quoting *Bohler*, 198 N.C. App. at 637-38, 681 S.E.2d at 806). A stipulation to a defendant's prior out-of-state conviction being classified as the default Class I felony, as opposed to a stipulation as to the similarity of his Michigan offense to a North Carolina offense, does not implicate a question of law. *Id.* at __, 777 S.E.2d at 769.

Although the worksheet did not specifically classify the Michigan conviction as a "felony," the classification of "I" clearly showed that defendant was stipulating that the conviction was in fact a felony which would be classified at the default level. Under these facts, defense counsel's statements can "reasonably be construed as a stipulation" to the prior convictions listed on his worksheet. *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. Because defendant stipulated to the Michigan conviction and its classification as a Class I felony, both on the worksheet and during his plea, the "stipulation as to his prior record level and his agreement to the sentence imposed in his plea arrangement were effective and binding." *Edgar*, __ N.C. App. at __, 777 S.E.2d at 770. This argument is without merit.

III. Sex Offender Registry and Satellite Based Monitoring

[3] Defendant next argues that the trial court erred in finding that defendant had been convicted of an offense against a minor and requests that this Court vacate and remand the sex offender registry and SBM orders due to this erroneous finding.

In SBM cases, " 'we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.' " *Singleton*, 201 N.C. App. at 626, 689 S.E.2d at 566 (quoting *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (brackets omitted)).

The issue before this Court concerns a clerical error that occurred when the trial court filled out the form orders pertaining to both sex offender registry and SBM. The State essentially conceded the existence

of this error but argues that the error is harmless since defendant would still be required to register as a sex offender and enroll in SBM even without the erroneous findings.

This Court has previously recognized that

> in the process of checking boxes on form orders, it is possible for the wrong box to be marked inadvertently, creating a clerical error which can be corrected upon remand. When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth. A clerical error has been defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.

State v. May, 207 N.C. App. 260, 262-63, 700 S.E.2d 42, 44 (2010) (citations, quotation marks, and brackets omitted).

In *May*, the trial court mistakenly checked Box 1(a) instead of Box 1(b) under the findings of fact section of the SBM order. *Id.* at 262, 700 S.E.2d at 44. Although the trial judge noticed the mistake during the hearing and called attention to its need for correction, the filed order in the record on appeal still contained the erroneously checked Box 1(a) and unchecked Box 1(b). *Id.* We held that such error was "clerical in nature[.]" *Id.* at 263, 700 S.E.2d at 44. Because the defendant admitted "that he pled guilty to one count of taking indecent liberties with a child, which he concedes is a 'sexually violent offense,' [this Court remanded] this matter to the trial court for limited purpose of correcting the clerical error[.]" *Id.*

Here, the trial court's findings for both the sex offender registry and SBM orders included checked boxes for Box 1(b) -- that defendant had been convicted of "a sexually violent offense under G.S. 14-208.6(5)"; Box 3 -- that defendant is a recidivist; and Box 5 -- that the offenses "did involve the physical, mental, or sexual abuse of a minor." However, the form orders also included the checked box for Box 1(a), finding that defendant had been convicted of "an offense against a minor under G.S. 14-208.6(1m)," which only applies to kidnapping, abduction of children, and felonious restraint.

Although the trial court did mistakenly find that defendant had been convicted of an offense against a minor, such error merely amounts to a

clerical error. Because defendant admits that he pled guilty to attempted statutory rape and indecent liberties with a minor child and does not contest that those offenses are not, in fact, reportable sexually violent offenses, and because we find that the mistake in the trial court's order amounts only to clerical error, we, therefore, "remand this matter to the trial court for the limited purpose of correcting the clerical error[s]." *May*, 207 N.C. App. at 263, 700 S.E.2d at 44.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in calculating defendant's prior record level. Furthermore, the trial court's mistakes on the judgment forms for the sex offender registry and SBM orders amount only to clerical errors which may easily be corrected on remand.

AFFIRMED IN PART AND REMANDED IN PART.

Judges BRYANT and DIETZ concur.

DALE THOMAS WINKLER AND DJ'S HEATING SERVICE, PETITIONERS
v.
STATE BOARD OF EXAMINERS OF PLUMBING, HEATING AND FIRE SPRINKLERS CONTRACTORS, RESPONDENT

No. COA15-1257

Filed 20 September 2016

Licensing Boards—disciplinary action—plumbing, heating, and fire sprinklers contractors—jurisdiction—HVAC system—pool heater—exhaust system

Although respondent Board's finding that petitioner Winkler was not qualified to install an HVAC system in a hotel was affirmed, the Board lacked jurisdiction to impose discipline regarding his inspection of the pool heater and exhaust system, which was ultimately the primary basis of the disciplinary provisions of the Board's order. The case was reversed and remanded for entry of a new order with sanctions solely based on Winkler's planned installation of the HVAC system.

WINKLER v. STATE BD. OF EXAM'RS OF PLUMBING, HEATING & FIRE SPRINKLERS CONTRACTORS

[249 N.C. App. 578 (2016)]

Appeal by petitioners from order entered 22 June 2015 by Judge Jeff Hunt in Watauga County Superior Court. Heard in the Court of Appeals 12 April 2016.

Bailey & Dixon, L.L.P., by Jeffrey P. Gray, for petitioners-appellants.

Young Moore & Henderson, P.A., by Angela Farag Craddock, John N. Fountain, and Reed N. Fountain, for respondent-appellee.

STROUD, Judge.

Petitioners Dale Thomas Winkler and DJ's Hearing Service ("Winkler"[1]) appeal from the trial court's order affirming respondent State Board of Examiners of Plumbing, Heating, and Fire Sprinklers Contractors (the "Board")'s order revoking Winkler's license. This case arises out of a series of failures by many different people to prevent or discover the source of a deadly leak of carbon monoxide into a hotel room at a Best Western Hotel in Boone, North Carolina, until after three people had died and one was injured by the carbon monoxide leak. But the question presented to this Court is not who is responsible for these tragedies. Our question is simply whether the Board had jurisdiction and authority to impose disciplinary action upon Winkler for the work he performed at the hotel. Based upon the applicable statutes and regulations, we find that the Board did not have jurisdiction over Winkler's inspection of the pool heater and exhaust system, although it did have jurisdiction over the later planned installation of an HVAC system in another part of the hotel. Because the discipline imposed was tailored to address the pool heater issue instead of the HVAC installation issue, we reverse and remand for entry of a new order with sanctions based solely upon Winkler's planned installation of an HVAC system which was not within his license.

I. Background

The basic facts regarding the relevant events at the Best Western Hotel in Boone are not in dispute. The hotel was managed by Appalachian Hospitality Management (the "hotel management"). Sometime in 2011, the hotel maintenance staff "replaced a propane gas pool heater with

1. Although Mr. Winkler appeals in both his individual capacity and through his business, DJ's Heating Service, for ease of reading, we refer to petitioners simply as "Winkler" throughout this opinion.

a used propane gas pool heater" which had previously been used "at another hotel managed by Appalachian Hospitality Management." In February 2012, the replacement propane pool heater "was converted from propane gas to natural gas [by] Independence Oil and Gas." The converted heater was permitted and inspected by "the local Authority Having Jurisdiction," the Town of Boone. The pool heater was in "an equipment room adjacent to the pool."

Over a year after the conversion of the heater to propane gas, the hotel maintenance staff was concerned the pool heater was "not functioning or the pilot light would not light." On or about 13 April 2013, the hotel management's maintenance staff asked Winkler, who was operating his business at the time as DJ's Heating Service, "to examine the pool heater and get it running." Mr. Winkler was licensed by the Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors with a "Heating Group 3 Class II (H-3-II)" license which is "limited to HVAC work on detached residential structures." The Board also issues a different level of license, H-3-I, which covers "all H-3 systems regardless of location unless the combined systems at the site exceed 15 tons." Mr. Winkler's employment history and experience before going into business as DJ's Heating Service included service and installation of HVAC systems. He had also been employed "by a propane gas company where he was actively involved in service on gas lines and setting tanks for propane fuel." Some members of the maintenance staff at the hotel knew Mr. Winkler because he had done some work on their residential properties.

Exactly what Mr. Winkler was asked to do, and what he did, on 13 April 2013 is crucial to the determination of jurisdiction in this case, so we will focus on these facts. The Board found as follows:

> 10. On or about April 13, 2013, [Winkler] examined the heater, and found that the gas supply had been cut off. Along with the Best Western Motel maintenance staff, [Winkler] cut the fuel on, and put the pool heater in operation. [Winkler] did not examine or inspect the exhaust or venting system for the pool heater at that time, and was not asked to do so.

In his testimony before the Board, Mr. Winkler described what he did that day as follows:

> [T]he only thing we done was [sic] broke the union loose. Verified the unit did not have any gas. Let maintenance know that. They went searching for the reason, being they

> are the ones that said gas was turned off in the ceiling. They turned the gas back on. We verified the pool heater had gas. Checked for leak. They lit the pool heater back. We left.

Testimony of various hotel employees was consistent with Mr. Winkler's description of what he did that day. Thus, in short, the pool heater was not working because the gas was not turned on; they turned the gas back on and relit the pool heater. It is not entirely clear from either the evidence or findings whether Mr. Winkler personally turned the gas to the heater back on or the hotel maintenance staff did, but either way, no physical change was made to the pool heater other than turning the gas back on and lighting the heater. No parts were removed or installed. No one knew why the gas had been cut off. The hotel maintenance staff did not ask Mr. Winkler to "examine or inspect the exhaust or venting system" that day and he did not do so.

Three days later, two people died in Room 225, which was "above the pool equipment room."

> 11. On April 16, 2013, Daryl Jenkins and Shirley Jenkins rented Room 225 at the Best Western Motel, which room was located above the pool equipment room where the pool heater was located.
>
> 12. On April 16, 2013, Daryl Jenkins and Shirley Jenkins died in Room 225. Autopsies were performed on Daryl Jenkins and Shirley Jenkins shortly thereafter and blood samples were submitted for a toxicology report.

Carbon monoxide poisoning was not immediately identified -- or even suspected -- when Mr. and Mrs. Jenkins died, by either the emergency medical personnel who responded or by the fire department for the Town of Boone, which assisted on the call, or by the hotel maintenance staff, or by the police department. Despite the simultaneous deaths of the husband and wife, everyone involved believed the deaths to be from "natural causes." But apparently the possibility of a gas leak may have occurred to the hotel owner, Mr. Mallatere, because he closed the room and asked that the gas fireplace in Room 225 be checked.

About three or four days after the Jenkins' deaths in Room 225, the hotel maintenance staff again called Mr. Winkler, this time to check for gas leaks to the fireplace in the room; he found none. After this, Mr. Malaterre asked the maintenance staff to have Mr. Winkler come back to the hotel again to check the venting from the pool heater. Mr. Winkler

came a few days later to check the exhaust from the pool heater, and he and the hotel maintenance manager confirmed that it was venting. Mr. Winkler also advised the hotel maintenance staff that he did not have equipment to check for carbon monoxide leaks but gave them the name of a company which would have the proper equipment to do carbon monoxide testing. No one called that company to have the room checked for carbon monoxide.

Room 225 remained closed for several more weeks, until 31 May 2013, not because of any problem with the room, but "just out of respect" due to the death of Mr. and Mrs. Jenkins there, according to the assistant general manager. The next day, on 1 June 2013, the toxicology report for the Jenkins was completed and "[a] lethal concentration of carbon monoxide" was found in their blood. But the results of the toxicology tests were not immediately provided to the hotel maintenance staff or the Board.

Still unaware of the results of the Jenkins' toxicology test results, on 8 June 2013, the hotel rented Room 225. Jeffrey Williams, a minor, and his mother stayed there. Jeffrey died and his mother was injured. When the fire department responded to this second call for a death in Room 225, they "immediately called for a rescue truck which carried [the carbon monoxide] monitoring equipment at the time, and . . . that's when we got some positive hits on the monitor." Due to the positive carbon monoxide readings, the fire department "isolated a much larger area than what we had, and called for one of the Hazmat teams" from Asheville, and "secured the building overnight." At this point, a variety of inspectors descended upon the hotel building, doing many tests and inspections and ultimately determining that carbon monoxide was coming from the pool heater into Room 225. Carbon monoxide was leaking from the pool heater in the equipment room, up through the wall into Room 225 above, and was venting from the pipe that ended on the outer wall of the hotel just below the intake for the air conditioner for Room 225. Toxicology reports regarding Jeffrey and his mother confirmed that "[e]xcessive amounts of carbon monoxide were found in their blood."

Unrelated to the pool heater issues, during the period from 4 June 2013 to 7 June 2013, the hotel maintenance staff also called Mr. Winkler "regarding the HVAC systems servicing the breakfast area, the lobby area and the laundry room" because they "were not operating properly." Mr. Winkler determined that "one system needed a relay, another needed a blower or fan motor and a third needed replacement." The hotel ordered the parts, and Mr. Winkler was to "install or repair the systems when the

equipment arrived." After installing the new equipment, the breakfast area system still did not work, so a "complete replacement was then ordered. The new equipment arrived, addressed to [Winkler] at the Best Western, on June 7, 2013." Mr. Winkler was to install the new equipment, but

> Upon his arrival at the Best Western on June 8, 2013, . . . Winkler observed the yellow tape placed around the scene by the police. [Winkler] then informed the maintenance staff that he (Winkler) should not be present, and stated that he had previously told hotel staff he did not have a commercial license. The maintenance staff denied [Winkler] made such prior statement."

The Board noted that Winkler's license did not qualify him to "contract, install or replace HVAC installations at the Best Western Motel" because it is "not a single family residential structure" and "[t]he aggregate tonnage" of the equipment at the hotel "was far in excess of the 15 ton limitation of any H-3 license, let alone an H-3-II license."

The investigations of the source of the carbon monoxide in Room 225 that followed the third death in the room found an egregious series of errors, going all the way back to the initial installation of the pool heater in 2011. The Board's order in this case identified the following deficiencies, listed here in roughly chronological order:

1. The manufacturer of the replacement pool heater installed by the hotel maintenance staff in 2011 "specified that the equipment not be converted from propane to natural gas."

2. Room 225 had a "combustible gas detector and alarm which had been located near the floor as appropriate for a facility using propane. An occupied structure using natural gas should locate such devices near the ceiling, as natural gas is lighter than air. This device would not detect CO in either location."

3. The pool heater was a "natural draft appliance" which is "required to be vented or exhausted either by a flue extending higher than the roof, or by the use of a forced draft system or power venter."

4. "The non-functioning power venter was rated at approximately 75000 BTU capacity while the pool heater which had been substituted at the Best Western had a capacity of 250,000 BTU's as reflected on the equipment label. Even when functioning, such a power venter was unlikely to exhaust all the harmful gasses."

5. The pool equipment room where the pool heater was located "also contained standard pool chemicals, which . . . were highly corrosive to metal, such as the venting pipes from the pool heater to the exterior of the building, and corrosive air and gasses were being drawn into and through the pool heater and exhaust flue. Evidence of corrosion was visible without the use of any equipment."

6. "In plain sight near the pool heater were a group of wires hanging in the air not connected to the pool heater but terminated with wire nuts. The wires were intended to supply power for a power venter which had been disconnected, likely well before [Winkler's] arrival."

7. "[T]he pool heater was utilizing a side wall to connect the vent pipe to the exterior of the Motel but no power venter was functioning; in addition, the rise of the slope of the flue pipe did not comply with the State Mechanical Code."

8. Despite the improper conversion from propane to natural gas and other deficiencies, including its location in the equipment room and lack of proper venting, the replacement pool heater was permitted and passed inspection by the Town of Boone.

9. Someone "had installed or altered penetrations of the fire-rated walls without adequate firestopping, eventually allowing products of combustion to travel into and through a stud cavity and enter room 225."

10. "[T]he vent pipe for the pool heater had multiple holes in both the double wall and the improperly used single wall vent pipe as a result of extensive corrosion." This corrosion had "developed and existed over a substantial period of time."

On or about 24 January 2014, the Board filed a Notice of Hearing instituting disciplinary action against Winkler, alleging violations of N.C. Gen. Stat. § 87-23(a) arising out of Mr. Winkler's "service call[s]" to the hotel (1) on or about 13 April 2013 regarding the pool heater; (2) in "late April or early May" 2013 regarding venting of the pool heater; and (3) from 4 June 2013 to 7 June 2013 regarding the HVAC system in the breakfast area. On or about 9 May 2014, Winkler moved to dismiss the Notice of Hearing, alleging that the Board did not have jurisdiction over his actions arising out of the inspection or evaluation of the pool heater because "[t]he Board's enabling statute, Article 2 of the Chapter 87 of the General Statutes, only contemplates 'installation,' or possibly

an intent to install, such as contracting to install without a license of [sic] the appropriate license."

On 13 May 2014, the Board held a hearing "to determine whether to revoke or suspend the license of [Winkler] on grounds of violation of G.S. 87-23(a) which provides that the Board may revoke or suspend the license of any plumbing, heating or fire sprinkler contractor who fails to comply with any provision or requirement of Chapter 87, Article 2, or for gross negligence, incompetence, or misconduct in the practice of or in carrying on the business of either a plumbing, heating or fire sprinkler contractor[.]" The Board issued its order on 10 June 2014, denying Winkler's motion to dismiss and imposing various sanctions upon Winkler, including suspension of his license for one year and imposing requirements during that year to "enroll in, attend and complete" several "courses intended to remedy the deficiencies in knowledge revealed by this order," as well as other requirements. Winkler's failure to complete all of the courses and other requirements would result in permanent revocation of his license.

On 25 July 2014, Winkler filed a petition for judicial review and stay of decision and order with the Superior Court of Watauga County, for review under N.C. Gen. Stat. § 150B-43 *et seq.* and N.C. Gen. Stat. § 87-23(a). The superior court stayed the Board's order pending review. Winkler's appeal was heard on 20 April 2015, and the superior court entered its order affirming the Board's decision on 22 June 2015. In the order, the court noted that its standard of review was "dictated by the issues presented[,]" citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002). The superior court engaged in *de novo* review of whether the Board violated "subsections G.S. 150B-51(b)(1), (2), (3), or (4) of the APA," and "[w]here the substance of the alleged error implicates subsection 150B-51(b)(5) or (6), the reviewing court applies the "whole record test.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004) (citation omitted). The order concluded that upon whole record review of "each Finding of Fact contained in the Order entered by the Board," "each Finding of Fact is supported by substantial evidence contained in the Record" and that the Board's "Conclusions of Law are supported by the Finding[s] of Fact[.]" The court also addressed Winkler's motion to dismiss for lack of jurisdiction under N.C. Gen. Stat. § 87-21, and using *de novo* review, concluded that

> the acts and omissions of [Winkler] fell within the statutory authority of the Board to regulate and discipline

> [Winkler]. The Court also notes [Winkler was] involved in activities beyond simply the acts and omissions relating to the pool heater.

The superior court thus denied Winkler's motion to dismiss for lack of jurisdiction, affirmed the Board's order, and dissolved the stay issued during the pendency of the appeal. On 1 July 2015, Winkler gave notice of appeal from the order. The trial court granted Winkler's motion for stay of the Board's decision and order pending review by this Court.

II. Standard of Review

The standard of review on appeal to this Court depends upon the issue presented.

> On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. Reversal or modification of the agency's final decision is permitted only when the reviewing court determines a petitioner's substantial rights may have been prejudiced as a result of the agency's findings, inferences, conclusions, or decisions being:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious, or an abuse of discretion.
>
> The first four grounds are "law-based" inquiries warranting *de novo* review. The latter two grounds are "fact-based" inquiries warranting review under the whole-record test. Under *de novo* review, a court considers the matter anew and freely substitutes its own judgment for the agency's. Under the whole-record test, a court examines all the record evidence -- that which detracts from the agency's findings and conclusions as well as that which tends to

> support them -- to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 120-21, 619 S.E.2d 862, 863-64 (2005), *aff'd per curiam*, 360 N.C. 396, 627 S.E.2d 462 (2006) (citations, quotation marks, and brackets omitted).

III. Disciplinary Jurisdiction

Winkler's first argument on appeal is that "[t]he trial court erred as a matter of law by rejecting the N.C. Supreme Court's opinion in [*Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 498 S.E.2d 616 (1998),] and thereby concluding the Board was not in excess of its statutory authority and jurisdiction and its action was not based on unlawful procedure." Winkler contends that "the Board lacks jurisdiction over the activity of a licensee that does not amount to an 'installation,' and was a mere inspection, evaluation or equipment check." Winkler challenges the Board's jurisdiction under N.C. Gen. Stat. Chapter 87, Article 2 as a matter of law. Because this argument presents a legal question, we review it *de novo*. *Trayford*, 174 N.C. App. at 121, 619 S.E.2d at 864. For purposes of this argument, we will assume that the Board's findings of fact were supported by substantial evidence.

Winkler's jurisdictional argument is based primarily upon the enabling statutes of the Board in Chapter 87, Article 2, of the North Carolina General Statutes. Specifically, N.C. Gen. Stat. § 87-21(a)(5) (2015) defines those who "shall be deemed and held to be engaged in the business of plumbing, heating, or fire sprinkler contracting" as follows:

> (5) Any person, firm or corporation, who for a valuable consideration, (i) *installs*, *alters or restores*, *or offers to install*, *alter or restore*, either plumbing, heating group number one, or heating group number two, or heating group number three, or (ii) lays out, fabricates, installs, alters or restores, or offers to lay out, fabricate, install, alter or restore fire sprinklers, or any combination thereof, as defined in this Article, *shall be deemed and held to be engaged in the business of plumbing*, *heating*, *or fire sprinkler contracting*; provided, however, that nothing herein shall be deemed to restrict the practice of qualified registered professional engineers. Any person who installs a plumbing, heating, or fire sprinkler system on property

> which at the time of installation was intended for sale or to be used primarily for rental is deemed to be engaged in the business of plumbing, heating, or fire sprinkler contracting without regard to receipt of consideration, unless exempted elsewhere in this Article.

Id. (Emphasis added).

Winkler holds a Class II license under N.C. Gen. Stat. § 87-21(b)(1) (2015), which covers "plumbing and heating systems in single-family detached residential dwellings." North Carolina General Statute § 87-23 (2015) sets forth the Board's authority to "revoke or suspend" a license or to "order the reprimand or probation of" a licensed contractor:

> (a) The Board shall have power to revoke or suspend the license of or order the reprimand or probation of any plumbing, heating, or fire sprinkler contractor, or any combination thereof, who is guilty of any fraud or deceit in obtaining or renewing a license, or who fails to comply with any provision or requirement of this Article, or the rules adopted by the Board, or *for gross negligence*, *incompetency*, *or misconduct*, *in the practice of or in carrying on the business of a plumbing*, *heating*, *or fire sprinkler contractor*, or any combination thereof, as defined in this Article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, or the rules of the Board, against any plumbing, heating, or fire sprinkler contractor, or any combination thereof, who is licensed under the provisions of this Article. All of the charges shall be in writing and investigated by the Board. Any proceedings on the charges shall be carried out by the Board in accordance with the provisions of Chapter 150B of the General Statutes.

N.C. Gen. Stat. § 87-23(a) (emphasis added).

But N.C. Gen. Stat. § 87-21(c) (2015) exempts certain acts from "[t]he provisions" of Article 2 of Chapter 87:

> (c) **To Whom Article Applies.** -- The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or attempt to engage in, the business of plumbing, heating, or fire sprinkler contracting, or

> any combination thereof as defined in this Article. *The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning, but shall apply to those who make repairs, replacements, or modifications to an already installed fire sprinkler system. Minor repairs or minor replacements within the meaning of this subsection shall include the replacement of parts in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping. Parts shall include a compressor, coil, contactor, motor, or capacitor.*

Id. (emphasis added).

The Board has also adopted regulations, by its authority under Chapter 87, which exclude certain repairs or alterations to an existing system from the ambit of "minor repairs" within the meaning of N.C. Gen. Stat. § 87-21(c). Specifically, any "connection, repair or alteration which if poorly performed creates a risk" of carbon monoxide exposure is not a "minor repair" or "alteration":

> .0506 MINOR REPAIRS AND ALTERATIONS.
> (e) Any connection, repair or alteration which if poorly performed creates risk of fire or exposure to carbon monoxide, open sewage or other gases is not a minor repair, replacement or alteration.
>
> (f) The failure to enumerate above any specific type of repair, replacement or alteration shall not be construed in itself to render said repair, replacement or alteration as minor within the meaning of G.S. 87-21(c).

21 N.C. Admin. Code 50.0506(e)-(f) (2016).

In addition, the regulations include the following relevant "Guidelines on Disciplinary Actions":

> (a) The provisions of G.S. 87, Article 2, the rules of the Board and the matters referenced therein are the guidelines by which the conduct of an entity subject to the authority of the Board are evaluated.
>
> . . . .

> (f) The Board may revoke the license of any licensee where it is found that the licensee through a violation of G.S. 87, Article 2, has increased the risk of:
>
> > (1) exposure to carbon monoxide or other harmful vapors . . . .
>
> (g) This Rule is not intended to limit the authority of the Board or the variety of facts for which action is required in a particular situation.
>
> (h) Any of the foregoing actions may result in a probation period or combination of suspension and probation. Condition of probation may include remediation, education, reexamination, record-keeping or other provisions likely to deter future violation or remedy perceived shortcomings.

21 N.C. Admin. Code 50.0412(e) (2016).

The parties agree that we review the interpretation of the applicable statutes *de novo*.

> The interpretation of a statute is a question of law and thus is reviewed *de novo* in an administrative appeal. But because this statute instructs a state agency to promulgate regulations to administer it, there is an additional layer of review. If the statutory language is unambiguous and the statutory intent clear, this Court must give effect to that unambiguous language regardless of the agency's interpretation. But if the statute is silent or ambiguous on an issue, this Court must defer to the agency's interpretation as long as the agency's interpretation is reasonable and based on a permissible construction of the statute.

Total Renal Care of N.C., LLC, v. N.C. Dept. of Health and Human Servs., __ N.C. App. __, __, 776 S.E.2d 322, 326 (2015) (citations and quotation marks omitted). In addition, North Carolina common law did not provide for the regulation of the businesses of installation of heating systems, so these statutes are "in derogation of the common law and penal in nature." *Elliott*, 348 N.C. at 235, 498 S.E.2d at 619. We are therefore required to strictly construe them. *Id.* ("It is well settled that statutes which are in derogation of the common law and which are penal in nature are to be strictly construed.").

In strictly construing these regulatory statutes, our Supreme Court has directed that we must focus upon "the conduct specifically

prohibited" and not upon the "underlying objectives and general principles" of Article 2 of Chapter 87. *Id.* at 236, 498 S.E.2d at 620.

> Instead, as noted above, the Court of Appeals focused on the policy objectives and general purpose of the Ethics Code.
>
> The Court of Appeals agreed that the Ethics Code prohibits sexual relations with clients. However, it noted that the Code never suggests that dual relationships of a sexual or social nature are permissible after therapy is terminated. By focusing on the underlying objectives and general principles of the Ethics Code, rather than the conduct specifically prohibited, the Court of Appeals erred. Accordingly, we reverse the Court of Appeals and hold that the Ethics Code must be strictly construed.

Id. (citations and quotation marks omitted). Yet we are also not to construe the statutes " 'stintingly . . . to provide less than what their terms would ordinarily be interpreted as providing. Strict construction of statutes requires only that their application be limited to their express terms, as those terms are naturally and ordinarily defined.' " *Id.* at 237, 498 S.E.2d at 620 (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)).

Winkler argues that the Board has "neither standing nor authority to conduct a hearing or attempt to discipline anyone of any allegation related to anything other than an installation (or contracting to install)." Winkler notes that Article 2 of Chapter 87 "never once uses the word 'inspection' (or 'evaluation' or any similar word or term.)". The Board strenuously argues that "installation" of a system is not required and that Winkler's "incompetence" in failing to recognize the hazards posed by the pool heater and increased risk of exposure to carbon monoxide are sufficient to confer jurisdiction upon the Board. The Board contends that the harm to the occupants of Room 225 in this case was "the precise kind of harm the legislature intended to bring under the authority of the Board 'in order to protect the public health, comfort and safety.' " More specifically, the Board contends:

> When, as here, the risk of exposure to carbon monoxide is increased by the work of one holding himself out to be a heating contractor who lacks the skill and proficiency to even ascertain the risk for that harm, regardless of whether that risk flowed from repair work on an existing

> system or installation of a new system, the lethal consequence of exposure to the carbon monoxide is the same. For reason of public safety, the Board therefore expressly retains jurisdiction to regulate work involving "*any* connection, alteration or repair which if poorly performed increases the risk of exposure to carbon monoxide."

Although we agree that this is most likely the type of harm which the Legislature intended to avoid by its regulation of heating contractors, our review is not based upon the Legislature's intent or general policy concerns. As directed by *Elliott*, we are guided by "the conduct specifically prohibited" and not upon the "underlying objectives and general principles." *Id.* at 236, 498 S.E.2d at 620. Thus we must examine the "conduct specifically prohibited" in this case to see if Winkler's actions fall within Article 2. *Id.*

As noted above, Winkler does not challenge the Board's findings of fact in this portion of his argument but only the legal conclusion that his actions in the "service calls" for the pool heater were actions in violation of Article 2. It is undisputed that Winkler did not "install" or offer to install the pool heater, as the Findings of Fact show that the installation had been done -- and very poorly done -- years before. The Board therefore focuses upon the words "alter" and "restore" as used in N.C. Gen. Stat. § 87-21(a)(5):

> Any person, firm or corporation, who for a valuable consideration, (i) installs, *alters* or *restores*, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three . . . shall be deemed and held to be engaged in the business of plumbing, heating, or fire sprinkler contracting[.]

(Emphasis added).

The Board argues that Winkler " 'restored' " the pool heater on "13 April 2013 when he restored the gas connection to the unit," thereby putting it back into operation. The Board relies upon the definition of "restore" from the Merriam-Webster Dictionary, 6th Ed. 2005, " 'to put back into use or service' " or " 'to put or bring back into a former or original state.' " Essentially, this reading of "restore" is so broad as to cover simply turning the heater on. Nonetheless, even if the meaning of "restore" is so broad as to cover the mere act of turning an existing heating system on, there is no dispute that Winkler is "engaged in the

business of" heating contracting and that he is licensed by the Board to engage in this business. N.C. Gen. Stat. § 87-21(a)(5). Thus, the question here is whether his actions as to the pool heater fall within Article 2's authorization of disciplinary action, as it clearly exempts certain actions. The actions for which the Board may impose discipline are more specifically limited and delineated by N.C. Gen. Stat. § 87-21(c).

Article 2 generally applies to anyone in business as a heating contractor, but N.C. Gen. Stat. § 87-21(c) *exempts* certain acts from "[t]he provisions" of Article 2 of Chapter 87:

> The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning, ... Minor repairs or minor replacements within the meaning of this subsection shall include the replacement of parts in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping. Parts shall include a compressor, coil, contactor, motor, or capacitor.

N.C. Gen. Stat. § 87-21(c).

Thus, the disciplinary provisions of Article 2 do *not* "apply to those who make minor repairs or minor replacements to an already installed system of plumbing, heating or air conditioning." *Id.* The pool heater was installed in 2011 and thus it was an "already installed system," so Winkler's actions are subject to discipline only if they were *more than* "minor repairs" or otherwise included under Article 2's coverage. *Id.* It is undisputed that Winkler did not *replace* any parts of the pool heater or its exhaust system and he did not change the "energy source, fuel type, or routing or sizing of venting or piping" so he did not "repair" the system or "replace" any component of the system as contemplated by N.C. Gen. Stat. § 87-21(c).

Furthermore, even if we take the factual findings as true and Winkler did all that the Board claims and found he did, none of those actions are actions regulated by N.C. Gen. Stat. § 87-21(a)(5). At most, the facts would show that Winkler turned the gas on. This is not enough to constitute an installation, alteration, or restoration under N.C. Gen. Stat. § 87-21(a)(5). As a practical matter, if we were to read the statute as the Board requests, a contractor would have to hold the highest level license before he could even examine or inspect a problem with an existing system to determine if he is capable of fixing it, since he could be subject to

discipline in the event of any future harm caused by the system even if he did not actually repair it. There would be no practical use for different levels of licensure by the Board.

The Board, however, argues that Winkler's actions constituted more than "minor repairs" and thus were covered by Article 2 based upon the regulations addressing risk of carbon monoxide exposure, so our analysis is still not over. The applicable regulations further define "minor repairs" or "minor alterations" by *excluding* from this category "any connection, repair or alteration which if poorly performed creates risk of . . . exposure to carbon monoxide." 21 N.C. Admin. Code 50.0506. But this regulation first requires that something be *done* to the "already installed system," N.C. Gen. Stat. § 87-21(c) -- a "connection, repair or alteration." 21 N.C. Admin. Code 50.0506. It also does not cover all connections, repairs or alterations but only those which "if poorly performed" create a risk of carbon monoxide exposure. *Id.* But based upon the Board's findings of fact, Winkler did not "repair" the pool heater as defined by N.C. Admin. Code 50.0506, nor did he perform, poorly or otherwise, any "connection, repair or alteration[,]" *id.*, to the "already existing system." N.C. Gen. Stat. § 87-21(c).

At this point, the Board falls back to the "Guidelines on Disciplinary Actions" which provide that "The Board may revoke the license of any licensee where it is found that the licensee through a violation of G.S. 87, Article 2, has increased the risk of: (1) exposure to carbon monoxide or other harmful vapors. . . ." 21 N.C. Admin. Code 50.0412(f). Once again, however, this regulation *first* requires "a violation" of Article 2, which takes us back to the above analysis, which finds Winkler's actions were exempted from Article 2, since Winkler did not replace or repair the already-existing system. Essentially, based upon the Board's findings, Winkler inspected or evaluated the pool heater and its exhaust system, but the words "inspection" and "evaluation" are not included under Article 2. Article 2 addresses installations of systems and non-minor repairs or replacements to existing systems, but it does not cover inspections or evaluations of existing systems, no matter how poorly performed.

The Board's order does not make any findings addressing any connection, repair, or alteration to the existing system which would be covered under Article 2 but relies generally upon the increase of risk of carbon monoxide exposure. Specifically, the Board made the following relevant conclusions of law:

> 19. The actions of . . . Winkler and his firm increased the risk of exposure to carbon monoxide for persons in

> the vicinity of the venting system within the meaning of Board rules 21NCAC.0506, and Board Rule 21NCAC.0412.
>
> 20. The foregoing evidence, particularly Findings of Fact numbers 9, 10, and 16 through 26 establish incompetence and violations of 87-23.

The findings of fact upon which the Board relied in making this conclusion are as follows:

> 9. On or about April 13, 2013, Mr. Winkler, doing business as DJ'S Heating Service, was asked by the maintenance staff employed by Appalachian Hospitality Management to *examine* the pool heater and get it running. The maintenance staff was concerned the heater was not functioning or the pilot light would not light.
>
> 10. On or about April 13, 2013, [Winkler] *examined* the heater, and found that the gas supply had been cut off. Along with the Best Western Motel maintenance staff, [Winkler] cut the fuel on, and put the pool heater in operation. [Winkler] did not examine or inspect the exhaust or venting system for the pool heater at that time, and was not asked to do so.
>
> . . . .
>
> 16. At the time of Mr. Winkler's *examination* of the venting and exhaust system of the pool heater, he was aware that there had been two deaths at that time in Room 225, thought to be from natural causes, and knew that Appalachian Hospitality Maintenance had sufficient concern . . . as to the proper venting of flue gasses to ask [Winkler] to check the systems.
>
> 17. Simple and reasonable *observation* of the pool heater by a heating contractor should cause the contactor to observe that the pool heater was a natural draft appliance. A heating contractor should know that such a system is required to be vented or exhausted either by a flue extending higher than the roof or by the use of a forced draft system or power venter. In addition, a heating contractor should know that a natural draft appliance draws air from the room as well as exhaust from the flame and discharges both into the flue.

18. Mr. Winkler knew or should have noticed that the room and the humid air in the room containing the pool heater also contained standard pool chemicals, which chemicals were highly corrosive to metal, such as the venting pipes from the pool heater to the exterior of the building, and corrosive air and gasses were being drawn into and through the pool heater and exhaust flue. Evidence of corrosion was visible without the use of any equipment.

19. Mr. Winkler knew or should have known that a vent pipe in such a location was prone to corrosion and that any holes in the flue would result in discharge of dangerous flue gasses inside the Best Western Motel and thereby expose its occupants to the same.

20. In plain sight near the pool heater were a group of wires hanging in the air not connected to the pool heater but terminated with wire nuts. The wires were intended to supply power for a power venter which had been disconnected, likely well before [Winkler's] arrival. Evidence of that disconnection was readily discernible by a minimally appropriate *visual inspection*.

21. During all relevant times, the pool heater was utilizing a side wall to connect the vent pipe to the exterior of the Motel but no power venter was functioning; in addition, the rise of the slope of the flue pipe did not comply with the State Mechanical Code.

22. [Winkler] also went outside the building to *examine* the terminus of the exhaust vent. He or one of the maintenance men was able [to] place his hand inside the metal cover over the end of the exhaust and feel warm air coming out when the pool heater was running, and those present discussed that fact. It was not necessary to remove the cover because it was severely corroded. The flue gasses exiting the pipe were rising and heat waves in the air were visualized. A heating contractor should know that the heat should be blowing out, not drifting up, if the power vent was operating properly.

23. A heating contractor would be placed on notice of the existence of hazardous conditions by *observing* the natural draft appliance, the corrosion visible inside

> the equipment room and outside at the terminus of the flue pipe, the disconnected wires, the manner in which the exhaust was discharging and the fact there was no vent extending higher than the roof of the building.
>
> 24. As a result of the absence of both a power venter and a flue pipe or exhaust extending above the roof, the exhaust venting system was dependent upon an insufficient natural draft to vent dangerous gasses such as carbon monoxide.
>
> 25. The non-functioning power venter was rated at approximately 75000 BTU capacity while the pool heater which had been substituted at the Best Western had a capacity of 250,000 BTU's as reflected on the equipment label. Even when functioning, such a power venter was unlikely to exhaust all the harmful gasses.
>
> 26. Mr. Winkler failed to shut the system down, failed to instruct the maintenance staff not to operate it, failed to call the gas company and advise them to shut off the gas, nor replace the power venter and connect the control wiring to the power venter, nor carry out investigation or evaluation of the efficacy of the venting between the ceiling of the room where the pool heater was located and the exterior of the building. [Winkler] left the pool heater in operation, despite the readily observable hazards.

(Emphasis added).

In the next finding, the Board notes that Winkler made "two visual examinations" of the system. Overall, the findings demonstrate that Winkler examined or inspected the system visually. He did not perform any "repair" or "replacement" of parts; instead the Board found that he *failed* to "replace the power venter" and *failed* to "connect the control wiring." Of course, his "failure" to do these things would be consistent with the fact that his license would not allow him to "*replace* the power venter" or to "*connect* the control wiring." At the most, what Winkler did would be commonly called an "evaluation" or "inspection" -- or an "examination" as noted in the findings of fact. We have no doubt that a poorly-done or incompetent evaluation or inspection might fail to discover problems with a heating system which allow exposure to carbon monoxide to continue -- that is exactly what happened here, more than once, and not only by Winkler -- but Article 2 simply does not cover "evaluations" or "inspections" of existing systems. Even if we accept the

Board's findings that many of the hazardous features of the pool heater and its exhaust system were clearly visible and should have been obvious to any heating contractor -- despite the fact that neither the inspector for the Town of Boone nor the licensed gas company which converted the heater to natural gas had ever noticed them -- inspections and evaluations are simply not covered by Article 2.[2]

We do not know *why* the Legislature chose not to include inspections of already-installed systems in the coverage of Article 2, or for that matter why it chose to exclude "minor repairs" and "minor replacements," N.C. Gen. Stat. § 87-21(c), but we are required to strictly construe the statute and to focus on "the conduct specifically prohibited" and not upon the "underlying objectives and general principles." *Elliott*, 348 at 236, 498 S.E.2d at 620. Under that standard, the Board acted beyond its disciplinary jurisdiction by imposing sanctions for Winkler's inspections of the pool heater and exhaust system. To the extent that the Board's order imposed discipline for these actions, it must be vacated.

Winkler has raised three other issues on appeal related to his examination of the pool heater and exhaust system, including whether the Board's findings of fact were supported by substantial evidence and whether the Superior Court properly conducted whole record review, but given our determination that the Board did not have jurisdiction to impose discipline for Winkler's actions as to his examination of the pool heater and exhaust system, we need not address these arguments. Yet we note, however, that the Board also made findings and imposed discipline based upon Winkler's plan to replace the HVAC system for the lobby and breakfast area of the hotel. These actions occurred from 4 June 2013 through 7 June 2013 and are related to the matters discussed above only because they occurred at the same hotel and came to the attention of the Board because of the tragic events of 8 June 2013.

Winkler's brief does not challenge the findings of fact as to the HVAC system and makes no legal argument challenging the Board's conclusion that Winkler was not qualified to install the new HVAC system which had been delivered to the hotel. Winkler simply states that he "knew the limitation of his license, but thought he could do 'like kind' installations since he could service any size system and the Board's law and administrative rules allow for certain like-kind installations." It is essentially

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2. In fact, only an extensive multidisciplinary evaluation of the hotel building and equipment by many experts after the second incident revealed all of the problems with the system as described by the Board's order.

undisputed that Winkler was mistaken in his belief that his license qualified him to install the new HVAC system in the hotel because it was a "like kind" installation, and the Board did have jurisdiction to impose discipline for this violation of 21 Admin. Code 50.0403 (2016). But the Board's order found multiple violations by Winkler, and the violations related to the pool heater and exhaust system were the primary focus of the order and the disciplinary measures imposed. We therefore remand the matter to the Board to enter a new order addressing only the disciplinary matters related to the planned installation of the HVAC system in the breakfast and lobby area of the hotel. In the order on remand, the discipline imposed should be based only upon the violations occurring during the period of 4 June 2013 through 7 June 2013, without consideration of the earlier events related to the pool heater or exhaust system. The Board does not have jurisdiction to impose discipline beyond that appropriate to address the violation of 21 N.C. Admin. Code 50.0403 by contracting to install the HVAC system.

IV. Conclusion

Accordingly, while we affirm the Board's finding that Winkler was not qualified to install the HVAC system, we find that the Board lacked jurisdiction to impose discipline regarding his inspection of the pool heater and exhaust system, which was ultimately the primary basis of the disciplinary provisions of the Board's order. We reverse and remand for entry of a new order with sanctions solely based on Winkler's planned installation of the HVAC system.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 SEPTEMBER 2016)

BAILEY v. McCORKLE No. 16-105	Cabarrus (14CVD2902)	Affirmed
IN RE A.G. No. 16-175	Catawba (15JA140-141)	Affirmed
IN RE A.L.H. No. 16-124	Rockingham (12JT104) (12JT105)	Affirmed in part; vacated and remanded in part
IN RE C.B. No. 16-144	Gaston (13JA175)	Affirmed
IN RE I.C. No. 16-157	Jackson (13JA25-27) (14JA44)	Affirmed
IN RE J.F.G. No. 16-205	Forsyth (13JT46)	Affirmed
IN RE M.A.P. No. 16-279	New Hanover (15JB78)	Vacated
IN RE P.E.P. No. 16-156	Guilford (13JT387)	Affirmed
McMILLAN-ERVIN v. ERVIN No. 16-209	Orange (15CVD625)	Dismissed
McNEELY v. HART No. 15-1274	Catawba (13CVD471)	Vacated and Remanded
NEWBRIDGE BANK v. HEDGEPETH No. 15-1372	Davidson (07CVD26)	Dismissed
PINKNEY v. PINKNEY No. 15-1362	Wake (13CVD3788)	Dismissed
SATTERFIELD v. SATTERFIELD No. 15-1194	Orange (11CVD1515)	Affirmed
SHOWFETY v. SHOWFETY No. 15-1328	Rowan (08CVD2853)	Remanded in part; affirmed in part
SIMON v. SIMON No. 15-1231	Iredell (07CVD2853)	Affirmed

STATE v. BANKS No. 16-182	Transylvania (14CRS51028)	New Trial
STATE v. BEST No. 16-27	Sampson (13CRS757)	No Error
STATE v. GOODE No. 16-83	Wake (13CRS225960)	No Error
STATE v. HAQQ No. 16-168	Catawba (15CRS52107)	No Error
STATE v. INGRAM No. 16-120	Durham (12CRS50666-67)	Affirmed
STATE v. JAMES No. 16-35	Wayne (14CRS51011) (14CRS51012)	No Error
STATE v. JOYNER No. 15-442-2	Iredell (13CRS53209)	No Plain Error
STATE v. McDONALD No. 15-1375	Wayne (13CRS53473)	Dismissed
STATE v. McGUIRE No. 16-198	Forsyth (14CRS57803)	Affirmed
STATE v. MEARS No. 16-286	Cleveland (13CRS52153-54)	No Error
STATE v. METZGER No. 15-1093	Wayne (11CRS53949)	No Error
STATE v. PINEDA No. 15-800-2	Wake (11CRS203626-27) (11CRS203631-37) (14CRS196)	No Error
STATE v. POTEAT No. 15-1339	Alamance (12CRS50800)	No Error
STATE v. REAVES No. 16-92	Columbus (13CRS50034)	Vacated and Remanded
STATE v. RICE No. 15-1258	Mecklenburg (12CRS255562-65) (12CRS255567-68) (12CRS255570)	No Error

STATE v. RIDDLE No. 16-197	Buncombe (15CR87529) (15CR87630)	No Error
STATE v. SANCHEZ No. 16-249	Craven (11CRS54863) (14CRS664)	No Error
STATE v. SMITH No. 16-61	Hoke (14CRS51077) (14CRS51097)	No Error
STATE v. WINT No. 16-244	Durham (07CRS44293)	Dismissed
THOMPSON v. EVERGREEN BAPTIST CHURCH No. 15-1031	Columbus (14CVS278)	Affirmed
UHLIG v. CIVITARESE No. 15-891	Alexander (10CVD289)	Reversed and Remanded
YARBOROUGH v. DUKE UNIV. No. 16-86	N.C. Industrial Commission (13-003239)	Affirmed
YOUNG v. LOWES HOME CTR., INC. No. 15-1077	N.C. Industrial Commission (Y02943)	Affirmed

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